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Equal Protection: The Jurisprudence of Denial and Evasion

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Equal Protection: The Jurisprudence of Denial and Evasion

Keywords

Equal rights, Race discrimination

ARTICLES

EQUAL PROTECTION: THE JURISPRUDENCE OF DENIAL AND EVASION†

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TABLE OF CONTENTS

Introduction	1308
I. The Jurisprudential Culture of Denial and Evasion:	
Conditioning Factors and Consequences	1315
A. Dominant Morals and Values	1315
B. Legal Education: The Indoctrination of Denial	1316
C. The Result: Evasion	1322
II. Reinvesting in Discredited Constitutional Stock	1324
A. Overview: A Jurisprudential Portfolio of Denial and Evasion	1324
B. Desegregation: The Imagery of Constitutional Achievement	1326
C. Constitutional Retraction and Counter-Insurgency .	1330
D. The Modern Litany of Denial and Evasion: Motive- Based Inquiry	1333
E. Beyond Denial and Evasion: Affirmative Action and the Manipulation of Reality	1336
1. Unfair advantage.....	1337
2. Stereotypes and stigmatization	1338

† This work is one of a series of articles by Professors Lively and Plass reflecting the combined results of their ideas, research, and observations regarding equal protection.

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3. Tribal politics	1340
F. Motive-Based Inquiry: Denial of Proof	1341
III. Accounting For Unfinished Constitutional Business	1346
A. Fortifying the Pertinent Standards	1348
B. Alternative Sources of Inspiration: Economic Opportunity and Unfair Advantage	1349
C. Constitutional Imperative and Democratic Consonance	1351
Conclusion	1354

INTRODUCTION

The equal protection guarantee of the fourteenth amendment, contrasted with most other constitutional provisions, states a relatively new proposition.¹ Despite its comparative youth, the equal protection guarantee has become an especially prolific source of litigation.² Dispute over the guarantee's scope has resulted not only from glosses that expand its original purview³ but also from principles that would effectuate its central concern with racial justice.⁴

1. The fourteenth amendment was ratified in 1868. U.S. CONST., amend. XIV. The first ten amendments, or the Bill of Rights, were ratified in 1791; the eleventh in 1792, the twelfth in 1804, the thirteenth in 1865, the fifteenth in 1870, the sixteenth and seventeenth in 1913, the eighteenth in 1919, the nineteenth in 1920, the twentieth and the twenty-first in 1933, and the twenty-second in 1951.

2. A computer search in the WESTLAW AllFeds library of the term "equal protection" reveals references to 21,663 decisions to date. Despite a longer history, a search in the same library using the term "first amendment" only reveals 16,668 decisions.

3. Debate has long focused on the issue of whether the fourteenth amendment applies the entire bill of rights to the States or whether Congress' sole intent was to ensure the equal treatment of all citizens. Compare M. K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 1-17 (1986) (articulating sweeping view of fourteenth amendment) with E. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-69 ix-xii (1990) (arguing for more narrow "original understanding" of fourteenth amendment); R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 81-83 (1990) (emphasizing principles of originalism and neutrality); W. E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 148-96 (1988) (providing historical analysis of fourteenth amendment interpretation).

While the debate centers on Congress' intent regarding the incorporation doctrine and federalism, the assumed application of the fourteenth amendment to the states resulted in an extension of certain fundamental rights that arguably do not exist in the letter of the Constitution. Examples of these are the general privacy rights that the Court has translated into fundamental liberties concerning marriage, family, and abortion. See *Zablocki v. Redhail*, 434 U.S. 374 (1978) (expressing marriage as fundamental liberty); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (delineating family as constitutionally protected liberty interest); *Roe v. Wade*, 410 U.S. 113 (1973) (stating constitutionally protected right to abortion).

4. The core concern of the equal protection guarantee was with "action of a state . . . directed by way of discrimination against negroes as a class." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1872) (holding that clause of fourteenth amendment forbidding states to deny any person equal protection of laws was intended to prevent hostile discrimination against blacks).

For a historical account of Congress' intent, see W. E. NELSON, *supra* note 3, at 64. There is no consensus among historians as to the extent to which Congress meant to protect the rights

Concepts of racial equality have long competed unsuccessfully with rival concerns. As early as 1789, the status, rights, and liberties of blacks were pitted against ratification interests.⁵ The ordering of those priorities and consequent accommodation of slavery began a two hundred year legacy of subordinating the aims and agenda of racial justice to competing interests.⁶

of blacks, although equality was clearly the central concern of all members of Congress, including Southern Democrats. *Id.* at 91. While the extent to which Congress meant to protect blacks may be debated, no real dispute exists regarding Congress' central concern. See Graglia, *Do We Have an Unwritten Constitution?—The Privileges & Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 83, 88 (1989) (noting that *Slaughter-House* was decided correctly because fourteenth amendment was meant only to provide newly freed slaves additional protection against discriminatory state practices); Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739, 743 (analyzing *Slaughter-House* and noting that "freedom of blacks was thus both the cause and the purpose of the Reconstruction amendments").

Many, however, believe that, while the protection of blacks was foremost on Congress' mind, they nonetheless had a broader approach in mind. See Curtis, *Privileges or Immunities, Individual Rights and Federalism*, 12 HARV. J.L. & POL'Y 53, 56, 59-60 (1989) (criticizing *Slaughter-House* because evidence suggested that framers of fourteenth amendment meant to protect "all rights for citizens, constitutional rights, and rights such as freedom of speech"); Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 897 n.153 (1986) (noting that press during reconstruction reported that public understood Civil Rights Act and fourteenth amendment to protect both whites and blacks).

5. The compromise to achieve ratification was effectuated by clauses apportioning federal representation upon the premise that slaves constituted three-fifths of a person, U.S. CONST., art. I, § 2, calibrating federal taxation pursuant to the same formula, *id.*, §§ 2 and 9, authorizing Congress to activate state militia to suppress domestic insurrections, *id.*, § 8, prohibiting Congress from terminating the slave trade prior to 1808, *id.*, § 9, barring federal and state taxation of exports that might have excluded products of slave labor, *id.*, §§ 9 and 10, denying states the power to liberate fugitive slaves, *id.*, art. IV, § 2, requiring the federal government to protect states against domestic violence, *id.*, art. IV, § 4, and excluding from the amendment process provisions for continuation of the slave trade and tax apportionment, *id.*, art. V; see also W. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812* 322-25 (1968) (providing account of how ratification interests superseded citizenship and personhood interests of slaves); W. WIECEK, *SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA: 1760-1848* 62-63 (1977) (discussing efforts of members of constitutional convention to accommodate interests of slave owners to secure ratification).

6. For example, during Reconstruction, Northern Republicans stopped short of securing constitutional protection for all the rights enjoyed by white Americans. B. BAILYN, *THE GREAT REPUBLIC: A HISTORY OF THE AMERICAN PEOPLE* 500 (1985). Voting rights were not secured for blacks by the constitutional amendments passed and ratified during Reconstruction. *Id.* Nor did they authorize the federal government to protect a broad panoply of civil liberties for blacks. *Id.* In addition, the fourteenth amendment granted no power to the national government and instead simply restricted the power of the states. *Id.*

In the years following Reconstruction, the judiciary often subordinated racial equality in favor of separatist interests of whites. During the late 1800s, states began systematically to codify separation of the races, and the Court accommodated such legislation. Burns, *Law and Race in America*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 92 (D. Kairys ed. 1982); see also *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding state-mandated segregation of railway cars). Although the Court overturned the separate but equal doctrine in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court still protects the white majority from the burdens of race-conscious remediation of past discrimination. See *Martin v. Wilks*, 490 U.S. 755, 761 (1989) (finding that, even if affirmative action plan is judicially sanctioned by court ordered plan or decree, white employees are not estopped from challenging plan); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 486 (1989) (holding race-conscious remedial policies subject to strict scrutiny).

The rendering of constitutional law, when distilled to its essential nature, is the product of competing ideals vying to inspire fundamental governing principles.⁷ The ultimate choice of values and their impact, more than associated rhetoric, disclose the reality of societal priorities and attitudes. The fourteenth amendment, over the course of its history, has proved more helpful in facilitating interests unrelated to its original concern with racial equality.⁸

Earlier this century, Justice Holmes characterized an equal protection claim as the sign of a desperate cause.⁹ Harsh as his observation may have been, even with respect to circumstances unrelated to the fourteenth amendment's core purpose, it is an apt epitaph for equal protection even when race is implicated. Justice Holmes' assessment was offered against a backdrop of Supreme Court jurisprudence that had weakened the force and narrowed the scope of the fourteenth amendment's operation.¹⁰

In one of its earliest decisions construing the fourteenth amendment, the Supreme Court in *Slaughter House Cases*¹¹ set the tone for subsequent equal protection jurisprudence. While recognizing the fourteenth amendment's concern with a class of citizens whose humanity had been denied by the Constitution, the Court defined the fourteenth amendment in parsimonious terms.¹² By finding that the

7. Unlike precise documentary terms that, for instance, set age requirements for presidential and congressional officeholders, U.S. CONST. art. I, § 3 and art. II, § 5, the meaning of equal protection is not evident on its face. Consequently, it is necessary to draw on principles and ideals that impart meaning to the equal protection guarantee. See generally Bell, *The Supreme Court, 1984 Term - Forward: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978). For a review and evaluation of the debate over appropriate reference points for constitutional vitalization, see D. LIVELY, *JUDICIAL REVIEW AND THE CONSENT OF THE GOVERNED: ACTIVIST WAYS AND POPULAR ENDS* 40-70 (1990) (discussing constitutional review).

8. See *supra* note 3 (noting extension of fourteenth amendment to privacy rights); see also *infra* notes 21 and 55 (itemizing decisions in which fourteenth amendment has been interposed to facilitate economic freedom).

9. See *Buck v. Bell*, 274 U.S. 200, 208 (1927) (holding that state sterilization of feeble-minded woman is not violation of equal protection or due process of law). The Court's reasoning that "the law does all that is needed when it does all it can" reflected deference to the legislature's judgment. *Id.*

10. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding official segregation of railway cars because law did not imply inferiority and because "social problems cannot be overcome by legislation"); *United States v. Harris*, 106 U.S. 629 (1883) (finding criminal enforcement action of Ku Klux Klan Act of 1871 unconstitutional because it reached private action); *United States v. Cruikshank*, 92 U.S. 542 (1876) (holding state action predicate limits claims or Congressional action pursuant to fourteenth amendment); *United States v. Reese*, 92 U.S. 214 (1876) (prohibiting federal court interference with voting rights).

As Derrick Bell has stated, "blacks became victims of judicial interpretations of the fourteenth amendment and legislation based on it so narrow as to render the promised protection meaningless in virtually all situations." D. BELL, *RACE, RACISM, AND AMERICAN LAW* 33 (2d ed. 1980).

11. 83 U.S. (16 Wall.) 36 (1872).

12. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1872) (finding that fourteenth

fourteenth amendment's privileges and immunities clause provided no new substantive protection, the Court pretermitted a potentially significant constitutional check.¹³ Even more restrictive was the Court's determination that the fourteenth amendment was entirely inoperative absent state action.¹⁴

Following reconstruction, an altered political structure was left to account for the interests of the nation's newest class of citizens. Responding to congressional initiatives calculated to eliminate traditional forms of discrimination, the Court in the *Civil Rights Cases*¹⁵ determined that it was time for blacks to "take . . . the rank of a mere citizen . . . and cease[] to be the special favorite of the laws . . . [and] be protected in the ordinary modes by which other men's rights are protected."¹⁶ The *Civil Rights Cases* evinced the Court's capacity to avoid or to discount the significance of race-dependent societal practices which for purposes of legal analysis were reduced to "mere discriminations."¹⁷ The Court's refusal to give special attention to the barely commenced business of racial justice inaugurated a pattern of denial and an evasion of reality that remains largely unbroken.¹⁸

With rare exceptions, the Supreme Court over the past century has formulated legal principles and standards that have avoided, rather than confronted, racial injustice. The separate but equal doctrine, for example, framed in an imagery of facial symmetry and couched in terms of dubious distinctions between political and social equality,¹⁹ deferred to and accommodated racist sentiment and custom.²⁰ While diminishing the efficacy of the fourteenth amend-

amendment only checked state's power to pass racially discriminatory laws); see also W. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT AND AMERICAN LIFE* 96-105 (1988) (discussing Court's narrow reading of fourteenth amendment in *Slaughter-House Cases* and subsequent decisions).

13. The Supreme Court found that the domain of privileges and immunities safeguarded by the fourteenth amendment were only those of federal citizenship protected by Article II, section 4 of the Constitution. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 74-78.

14. *Id.* at 81 (finding that only state action will ever fall afoul of fourteenth amendment).

15. 109 U.S. 3 (1883).

16. The *Civil Rights Cases*, 109 U.S. 3, 25 (1883).

17. *Id.* (stating that "[m]ere discriminations on account of race or color . . . [are] not regarded as badges of slavery").

18. Compare *The Civil Rights Cases*, 109 U.S. at 25 (repudiating preferential treatment of blacks) with *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 495 (1989) (acknowledging sad history of racial discrimination but articulating criteria protecting equal protection interests of whites); see also *infra* notes 112-218 and accompanying text (discussing Supreme Court standards facilitating denial and evasion).

19. See *Plessy v. Ferguson*, 163 U.S. 537, 551-52 (1896) (announcing separate but equal doctrine and distinguishing between constitutionally required civil and political equality and permissible social equality).

20. See *id.* at 552 (deferring to state laws that distinguished race on basis of proportion of "white blood" and "colored blood").

ment as a facilitator of racial justice, the Court simultaneously enhanced the amendment's utility as a vehicle for effectuating general principles of economic liberty.²¹ Within three decades of its ratification, the fourteenth amendment had been transformed primarily into a guarantee of fundamental liberties unrelated to its limited concern with racial equality. In sharp contrast to the aggressive development of the doctrine of economic liberty, the separate but equal doctrine originated and endured for more than half a century as a methodology of constitutional underachievement.²²

Writing for the majority in *Giles v. Harris*,²³ Justice Holmes recognized the Constitution's limited utility to reckon with the reality and consequences of racial prejudice and discrimination.²⁴ Responding to claims that the voting rights of black citizens were being denied, Justice Holmes observed that an injunction would be ignored by the white majority and its elected agents.²⁵ He thus concluded that judicial intervention would be "pointless" and advised that "relief from a great political wrong, if done, or alleged by the people of a State and the State itself, must be given them by the legislature and political department of the United States."²⁶ By refusing to actuate the Constitution to confront racial discrimination, Justice Holmes accommodated the dominant moral sense of the time. Although not

21. See, e.g., *Adkins v. Childrens' Hospital*, 261 U.S. 525, 561-62 (1923) (finding unconstitutional District of Columbia law that had set minimum wages for union); *Coppage v. Kansas*, 236 U.S. 1, 14 (1915) (voiding Kansas law that had outlawed "yellow dog" contracts); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 154-65 (1914) (providing that state may not impair right of non-state citizens to contract); *Lochner v. New York*, 198 U.S. 45, 64 (1905) (finding unconstitutional New York law limiting number of hours bakers could require employees to work); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (stating concept of liberty includes right to enter into contracts and to pursue any livelihood or vocation); *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394, 396 (1886) (conferring fourteenth amendment "personhood" status on corporations).

22. Justice Harlan, who originally resisted the separate but equal doctrine set forth in *Plessy*, accepted the argument that limited public funds justified race-conscious closure of a high school. See *Cumming v. Board of Educ.*, 175 U.S. 528, 542 (1899) (holding state assistance to high school for white children without providing equal assistance for similar school for black children constitutionally permissible). The separate but equal doctrine established in *Plessy* was finally abolished in 1954 when the Supreme Court abandoned the doctrine in the context of public education. *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (holding segregation of public schools inherently unequal).

23. 189 U.S. 475 (1903).

24. See *Giles v. Harris*, 189 U.S. 475, 482-88 (1903) (refusing to use equity power to compel state's board of registration to place black plaintiff's name on voting list). The Court noted in *Giles* that:

the court has little practical power to deal with the people of the State in a body. The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent [requires] something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed.

Id. at 488.

25. *Id.* at 482-88.

26. *Id.* at 488.

directly addressing equal protection concerns, the result in *Giles* disclosed a model of judicial review as inattentive to minority interests as it was deferential to majority interests.

Modern equal protection jurisprudence likewise is characterized by denial and evasion. With the exception of the desegregation mandate of *Brown v. Board of Education*,²⁷ as originally enunciated, equal protection principles have been a function of majoritarian convenience. Modern jurisprudence continues to be characterized by sophisticated fictions and glosses that deny the reality of racial discrimination and inequality.²⁸ Like the separate but equal doctrine, *de facto* segregation,²⁹ discriminatory intent,³⁰ and color-blindness³¹ have represented analytical methodologies for avoiding meaningful confrontation with racial discrimination. By avoiding serious attention to and consequent accounting for racial injustice, they compound a jurisprudential legacy reflecting denial that is both constitutional and psychological.³²

Until 1954, the separate but equal doctrine was a convenient legalism for avoiding the realities of racism and its constitutional implications. Such doctrinal service, when the underlying guarantee essentially was intended to account for minority interests, has required considerable intellectual gymnastics. In *Brown*, the Supreme Court suggested the possibility of constitutional law that might reckon forcefully with minority interests. Eventually the Court qualified this doctrinal potential to ensure that equal protection operated only within the majority's dominant standards of tolerance.³³ Perhaps the most significant limiting principle negating the guaran-

27. 347 U.S. 483 (1954).

28. See Blum, *Two Hundred Years Later: Hopes Not Realized, Promises Not Fulfilled: The Constitutionalization of Racism*, 72 MASS. L. REV. 56, 58-60 (1987) (noting how recent decisions deny presence of racial discrimination in today's society). Racial discrimination, and the courts' ignorance of it, has resulted in the continued inequality between the races. See Sedler, *The Constitution and the Consequences of the Social History of Racism*, 40 ARK. L. REV. 677, 678-83 (1987) (discussing social ramifications of discrimination).

29. See *infra* notes 118-26 and accompanying text (discussing application of *de facto* and *de jure* standards).

30. See *infra* notes 127-50 and accompanying text (discussing application of discriminatory intent standard).

31. See *infra* notes 70, 115-20, 153 and accompanying text (discussing origins and impact of color-blind criteria).

32. Modern jurisprudence may be more forthcoming in acknowledging past, if not contemporary, wrongs. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 278 (1986) (acknowledging reality of past societal discrimination but concluding that concept is "too amorphous" to justify remediation).

33. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (acknowledging historical suffering of blacks but prohibiting remediation at expense of whites). For contrasting discussion of color blind theory, compare Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 21-26, with Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 236-49 (1971).

tee's influence in modern times is the requirement that discriminatory purpose must be proved as a prerequisite for establishing a constitutional violation.³⁴ Motive-based inquiry has evoked criticism because actual purpose is elusive, easy to disguise, and thus difficult to discern.³⁵ The intent requirement for equal protection purposes, despite its rejection in other constitutional settings, suggests that the standard's primary utility is as a methodology of evasion.³⁶ Although useful in discerning and responding to overt discrimination, motive-based inquiry is largely useless for purposes of identifying or accounting for subtle or disguised forms of prejudice that characterize modern circumstances. Consequently, motive-based inquiry operates primarily as a guarantee against race-conscious remediation and is consistent with a well-established pattern of review that avoids unsettling demands upon the established political and social order.

Constitutional law and equal protection have consistently attended to dominant attitudes and priorities. If equal protection essentially functions as a vehicle for servicing majoritarian interests, however, it is worth considering why its documental presence is required. History suggests that equal protection operates primarily on behalf of an imagery that reflects evasion and denial of racial reality. If confrontation of racial discrimination was the norm, constitutional color-blindness would have been insisted on a century ago when official segregation was the issue rather than now when remediation remains an imperative. Instead, equal protection jurisprudence reflects a society that merely rebukes accidental manifestations of prejudice, condemning them as social blunders rather than recognizing them as symptoms of a deeper societal pathology. Moreover, it represents a model of constitutional review that merits cynicism rather than credibility and respect.

This Article begins with a discussion of Supreme Court equal pro-

34. See *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-66 (1977) (holding that community refusal to rezone not demonstrable product of official racial discrimination); *Washington v. Davis*, 426 U.S. 229, 232-52 (1976) (holding that police department's employment testing procedures not result of intentional discrimination); see also *infra* notes 127-50 and accompanying text (examining development and application of motive-based inquiry). See generally Comment, *Proof of Discriminatory Purpose Under the Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburg*, 12 HARV. C.R.-C.L. L. REV. 725 (1977).

35. As one federal appeals court has put it, modern discrimination is much more subtle than before—"the days of Bull Conner are largely past." *Segar v. Smith*, 738 F.2d 1249, 1278 (D.C. Cir. 1984) (emphasizing that disparate impact theory of discrimination is critical to eradication of discrimination and in developing opportunities for minorities and women), *cert. denied sub. nom. Meese v. Segar*, 471 U.S. 1115 (1985).

36. See *infra* notes 214-18 and accompanying text (discussing nature and disutility of motive-based inquiry).

tection jurisprudence that regularly has denied, evaded, and accommodated racism and racial discrimination. It next demonstrates how the analytical methodology of avoidance persists as a central feature of modern review. Finally, the Article proposes a jurisprudential course of action that confronts racial realities and effectively accounts for minority interests consistent with societal traditions and expectations.

I. THE JURISPRUDENTIAL CULTURE OF DENIAL AND EVASION: CONDITIONING FACTORS AND CONSEQUENCES

A. *Dominant Morals and Values*

The concept of equal protection inevitably creates tension within a republican political system. An inherent resistance exists to equal protection claims insofar as they challenge policy that is the product of the representative process and popular sentiment.³⁷ Further confounding the interests of equal protection are educational processes that avoid and underdevelop pertinent cultural and pluralistic realities. The limited perspective or unawareness of equal protection concerns thus is culturally engrained in early but critical fashion. Jurisprudential inattention to constitutionally implicated minority interests, as a consequence, is normative if not virtually ordained.³⁸

Insensitivity to the imperatives of cultural pluralism transcends the equal protection context. In *Federal Communications Commission v. Pacifica Foundation*,³⁹ for instance, the Supreme Court formulated a first amendment standard in terms of mainstream decency and taste.⁴⁰ The perspective and result evoked the criticism that the Court disclosed an "acute ethnocentric myopia" and a "depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of

37. See Horowitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599, 600-01 (1979) (noting that Chief Justice Marshall's seminal articulation of judicial review in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) has been criticized as anti-democratic).

38. Over time, lack of sensitivity to cultural differences and disparities has resulted in a more limited application of the mandate of the equal protection clause. In 1954, the Court was willing to take remedial action to ensure equality of education in *Brown*, but since then has backed away from Brown's full potential. See *Board of Educ. of Oklahoma City v. Dowell*, 111 S. Ct. 630 (1991) (opening door for dissolution of federal desegregation decree).

39. 438 U.S. 726 (1978).

40. *FCC v. Pacifica Found.*, 438 U.S. 726, 749-50 (1978) (upholding Federal Communications Commission (FCC) regulation of indecent or offensive expression). A father filed a complaint to the FCC after he and his son heard a radio broadcast of a satirical monologue by George Carlin that included seven common expletives. *Id.* at 729-31. In finding that the FCC could regulate language susceptible to depiction as indecent, the Court found the expression at issue equivalent to a "pig in the parlor instead of the barnyard." *Id.* at 750.

this Court, and who do not share their fragile sensibilities."⁴¹ By delineating in a general and undifferentiating fashion the permissible circumstances and venue for expression denominated as indecent or offensive, but not obscene, the Supreme Court disregarded the reality that certain cultural subgroups routinely trade in expression that the majority finds offensive and consequently sanctions.⁴² The analysis reflects an inclination to fashion the contours of basic law pursuant to dominant taste rather than a pluralistic imperative.⁴³ The decision has been described "in the broader perspective . . . [as] another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting and speaking."⁴⁴ Equal protection speaks to minority interests even more directly than the first amendment. Like other constitutional protections, it is not self-defining and so is a function ultimately of values, experience, and attitudes.⁴⁵

B. Legal Education: The Indoctrination of Denial

Race has been a dominant factor in the Constitution's formation and evolution.⁴⁶ Although race has been a prolific source of consti-

41. *Id.* at 775-76 (Brennan, J., dissenting).

42. *Id.* at 776 (Brennan, J., dissenting). As Justice Brennan recognized: "[w]ords generally considered obscene like 'bullshit' and 'fuck' are considered neither obscene nor derogatory in the black vernacular except in particular contextual situations and when used with certain intonations." *Id.* (Brennan, J., dissenting) (citing C. BINS, TOWARD AN ETHNOGRAPHY OF CONTEMPORARY AFRICAN ORAL POETRY, LANGUAGE AND LINGUISTICS WORKING PAPER NO. 5 82 (1972)).

43. Consistent with that sentiment, the Court has noted that "few of us would march our sons and daughters off to war to preserve the citizen's right to see [adult movies] in the theaters of our choice." *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 58-73 (1971) (holding that ordinance prohibiting adult theaters within 1,000 feet of residential area is not violative of equal protection clause of fourteenth amendment). The Court's observation that society has a diminished interest in offensive expression misses the point that such expression is a part of the diversity of a pluralistic society.

44. *Pacifica Foundation*, 438 U.S. at 777 (Brennan, J., dissenting).

For additional examples of the Supreme Court's failure to acknowledge pluralistic realities, see *McCleskey v. Kemp*, 481 U.S. 279, 312 (1986) (determining that statistical disparities in administration of capital punishment are inevitable in criminal justice system and merely correlate with race); *Memphis v. Greene*, 451 U.S. 100 (1981) (holding that southern city erection of street barrier routing black residents around white neighborhood is not violative of thirteenth amendment).

45. See *supra* note 7 and accompanying text (discussing principles and ideals underlying equal protection guarantee).

46. It has not followed, however, that the Constitution has always protected against racial oppression. To the contrary, the Constitution's architects consciously accounted for the interests of slave owners. See Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987) (noting framers' effort to deny blacks basic constitutional rights); see also *supra* notes 5-6 and accompanying text (describing constitutional compromise). The Supreme Court read the Constitution in 1857 as excluding blacks from the phrase "[w]e the people." *Scott v. Sanford*, 60 U.S. (19 How.) 393, 405 (1857). Ever since Reconstruction, when Congress passed the thirteenth, fourteenth, and fifteenth amendments, race has been a prominent topic of constitutional attention. See *supra* note 2.

tutional conflict and law, its significance tends to be underdeveloped and avoided in the legal education process. Jurisprudential inattentiveness or insensitivity thus comports with training that fails to account meaningfully for the relevance of race to society's evolution. Jurisprudence characterized by denial, evasion, and accommodation is the logical consequence of an educational process that effectively excludes or trivializes racial realities.

Legal casebooks, by their structure and content, mostly portray constitutional unresponsiveness to racial injustice as aberrational rather than normative. Race-neutral pressures help to reinforce patterns of inattention to issues of race.⁴⁷ Composing a constitutional law text or course requires hard choices insofar as the body of legal research and case law multiplies annually, while page and time limits remain relatively static. Ultimately, however, editorial decisions concerning textual and course content reflect an ordering of priorities that disclose perceptions of what is and what is not significant.⁴⁸

A review of the dominant constitutional law texts reveals that coverage of constitutional law concerning race is more limited and less revealing than history would ordain. Knowledge that the Constitution was hostage to slavery interests must be acquired from sources other than those commonly used for legal education.⁴⁹ Basic literature is altogether bereft of content that would inform and sensitize future lawyers and judges to the significance of race to the origin of the Constitution and the republic.

Most constitutional law texts commence discussion of racial jurisprudence with the enactment of the post-Civil War amendments.⁵⁰

47. Recent decisions undermining affirmative action in favor of a color-blind approach to equal protection tend to make issues of race seemingly unimportant to the student. Efforts to view equal protection from a color-blind perspective ignore the history and current presence of racial injustice, disparities, and discrimination, and even suggest to the student that blacks have received too much attention in equal protection jurisprudence. See Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1344 (1986) (noting how Reagan policies "reflect, reinforce, and capitalize on widespread feelings that blacks have received an undeserved amount of the nation's attention").

48. See R. POSNER, *THE PROBLEMS OF JURISPRUDENCE*, 42-43 (1990) (discussing role of legal training in future legal decision making); Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1069-70 (1985) (noting power casebook editor has over readers' understanding of law); Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 43-44 (D. Kairys ed. 1982) (noting political nature of casebook editing); Williams, *The City, the Hope of Democracy: The Casebook as Moral Act* (Book Review), 103 HARV. L. REV. 1174, 1176 (1990) (noting how casebook can be transformed from "lowly repository of reified doctrine into a tool for organizing civic transformation").

49. For instance, it is necessary to examine auxiliary sources to learn that the cost of constitutional ratification was ten provisions that directly or indirectly accommodated slavery. See *supra* note 5 (describing constitutional ratification compromise).

50. The post-Civil War amendments include the thirteenth amendment, which prohibits

Relevant background and perspective are lost, however, as coverage fast forwards past a brief treatment of *Plessy v. Ferguson*⁵¹ in 1896 to the desegregation mandate of *Brown v. Board of Education* in 1954.⁵² Lost in the interval are some trenchant realities that are not glossed over in the renditions of other constitutional subjects.

While considerable attention is devoted to the rise and fall of economic liberty that preceded modern substantive due process analysis,⁵³ racial jurisprudence during the same period is largely neglected.⁵⁴ The more detailed coverage of fundamental rights and interests unrelated to race may be consonant with judicial steerage of the fourteenth amendment away from its central purpose. Although the amendment originally was prompted by concern with the status of blacks, the Court soon converted it into a vehicle to advance general concepts of marketplace liberty.⁵⁵ While aggres-

slavery, U.S. CONST. amend. XIII; the fourteenth amendment, which guarantees against state interference with or denial of privileges and immunities, due process, and equal protection, U.S. CONST. amend. XIV; and the fifteenth amendment, which secures the right to vote free from racial discrimination, U.S. CONST. amend. XV. Each of the provisions authorizes Congress to enact legislation to effectuate them. U.S. CONST. amend. XIII, § 2, amend. XIV, § 5, amend. XV, § 2.

51. 163 U.S. 537, 554 (1896) (finding that fourteenth amendment was created to enforce absolute equality of races under law, but not intended to abolish natural distinctions based on color or to enforce commingling of races on terms unsatisfactory to either).

52. 347 U.S. 483 (1954) (finding "separate but equal" doctrine in public education inherently unequal).

53. See W. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHIFFRIN, CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS 724-50, 751-56, 840-900 (6th ed. 1986) [hereinafter W. LOCKHART] (providing extensive background and modern contours of privacy rights); G. GUNTHER, CONSTITUTIONAL LAW 441-556 (1985) (providing detailed rendition of constitutional evolution of privacy rights).

54. Even *Scott v. Sanford*, which upheld slavery and asserted that blacks had justly and purposely been reduced to the status of property, is only briefly discussed and then solely for purposes unrelated to race. See, e.g., J. BARRON, C. T. DIENES, W. MCCORMACK & M. REDISH, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 320-21 (1987) [hereinafter J. BARRON] (adverting briefly to *Scott* decision as example of early disinclination to incorporate substantive meaning into fifth amendment); G. GUNTHER, *supra* note 53, at 23, 445 (referring to *Scott* decision only as background material on judicial authority and in introduction to substantive due process); W. LOCKHART, *supra* note 53, at 24 n.120 (providing unexplicated annotation of *Scott* decision in introductory section on judicial review); G. STONE, L. SEIDMAN, C. SUNSTEIN, & M. TUSHNET, CONSTITUTIONAL LAW 440-43 (1986) [hereinafter G. STONE] (excerpting significant passages of *Scott* opinion central to decision's meaning). The implication is that *Scott* is a mere derelict of the law. See Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979, 989 (1987) (quoting P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 186 (1970)). Pre-Civil War cases that favored the interests of slavery are omitted altogether. See *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847) (upholding fugitive slave act); *Queen v. Hepburn*, 11 U.S. (7 Cranch) 290 (1813) (recognizing freedom of slave not established except by law of local jurisdiction).

55. See, e.g., *New York Life Ins. Co. v. Head*, 234 U.S. 149, 154-69 (1914) (providing that states may not impair right of non-state citizens to contract); *Lochner v. New York*, 198 U.S. 45, 57-65 (1905) (holding right to contract part of liberty protected by fourteenth amendment); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (stating concept of liberty includes right to enter into contracts and to pursue any livelihood or vocation). Emphasis on contractual liberty, embodied by *Lochnerism*, is widely discredited by modern jurisprudence and commentary. See, e.g., *United States Trust Co. v. New Jersey*, 431 U.S. 1, 62 (1977) (Brennan,

sively asserting the fourteenth amendment for such purposes, the Supreme Court deferred to racist custom and preference that essentially neutralized the amendment's original concern.⁵⁶ Any discourse that examines or affords insight into that conversion is omitted from basic texts.⁵⁷

Textual attention to equal protection developments since 1954, although more extensive, is also characterized by significant omissions. The widespread evasion of, delay of, and resistance to desegregation, which effectively was stalled until the entire nation tired of the process and its implications, is afforded cursory treatment.⁵⁸

J., dissenting) (stating that "Constitution . . . can actively intrude into . . . economic and policy matters only if [the Court is] . . . prepared to bear enormous institutional and social costs"); *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963) (noting whether "legislature takes for its text books Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours"); McClosky, *Economic Due Process and the Supreme Court*, 1962 SUP. CT. REV. 34, 38 (discussing Court's substantive due process doctrine and its abdication since *Lochner* era). *But see* Wonnell, *Economic Due Process and the Preservation of Competition*, 11 HAST. CONST. L.Q. 91 (1983) (suggesting Court will not defer on economic matters in certain circumstances).

Ample pedagogical background is afforded to modern jurisprudential deference to legislative judgment with respect to economic policy. *See, e.g.,* J. BARRON, *supra* note 54, at 385-97 (discussing Court's retreat since *Lochner* era from granting substantive due process challenges to economic legislation); G. GUNTHER, *supra* note 53, at 441-67 (examining same); W. LOCKHART, *supra* note 53, at 377-99 (stating same); G. STONE, *supra* note 54, at 724-44 (explaining same).

56. *See Plessy v. Ferguson*, 163 U.S. 537, 550 (1896) (stating that official segregation is reasonable exercise of police power when referenced "to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order"); *see also supra* note 4 (discussing original intent of text).

57. Justice Holmes's dissent, criticizing the majority's decision in *Lochner* as merely advancing the social Darwinist "ideology of Herbert Spencer," is included. *See* W. LOCKHART, *supra* note 53, at 392-93 (reprinting selected sections of *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)). No reference is made to his majority opinion in *Giles v. Harris*, however, concluding that it would be "pointless" to give relief to minorities even if their constitutional claims were valid. *Giles v. Harris*, 189 U.S. 475, 482-88 (1903) (discussing whether state suffrage provisions that disenfranchised blacks conflicted with fourteenth amendment and denying equitable relief theoretically available on grounds that it would not be effective). *Lochner* is referenced or cited multiple times. *See* W. LOCKHART, *supra* note 53, at lxiii-lxiv (listing 22 references to *Lochner*). Justice Harlan's dissenting opinion in *Plessy v. Ferguson*, 163 U.S. 537, 562-64 (1896) (Harlan, J., dissenting), in which he chastises the majority for its investment in racial supremacy, is faithfully included in the basic literature. *See* J. BARRON, *supra* note 54, at 521; G. GUNTHER, *supra* note 53, at 634-35; W. LOCKHART, *supra* note 53, at 1156-57; G. STONE, *supra* note 54, at 453-54. Omitted, however, is his majority opinion a few years later, in *Cumming v. Richmond County Board of Education*, wherein the Court justified the closure of a black high school because the meaningful implementation of equalization principles would have "impair[ed] the efficiency of" education for white students. *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528, 544-45 (1899). The decision to close the black school was couched in terms of a fiscal reality for the school board rather than the result of racial animus. *Id.* The decision neatly illustrates how the separate but equal doctrine emphasized separateness and countenanced not only inequality but outright denial of constitutionally protected interests. The Court did not factor in the equality component of the separate but equal doctrine for several decades. *See Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 352 (1938) (holding that, absent existence of black law school, state is obligated to admit black students to existing white law school).

58. *See* J. BARRON, *supra* note 54, at 531-35 (discussing state and general public actions that were undertaken to stall desegregation mandate); G. GUNTHER, *supra* note 53, at 712-15

The context of *Cooper v. Aaron*,⁵⁹ which typified the intense hostility toward the desegregation mandate and represented the functional equivalent of a state insurrection quelled by federal troops, is barely discussed.⁶⁰ Such limited consideration is comparable to the compression of the separate but equal era, which accounts for half of the history of the equal protection guarantee, into a tiny fraction of the approximately 250 pages devoted to equal protection.⁶¹

Reduction or elimination of context and transformation of potentially sensitizing cases into sterile legalisms contrasts with the coverage of other constitutional law issues. For example, first amendment jurisprudence is preceded by a comprehensive perspective of the value of free expression⁶² and enriched by extensive coverage and contextualization of early cases.⁶³ The dedication of

(stating same); W. LOCKHART, *supra* note 53, at 1187-89 (noting same); G. STONE, *supra* note 54, at 470-75 (explaining same).

59. 358 U.S. 1 (1958) (responding to state efforts to circumvent desegregation obligations).

The governor of Arkansas had dispatched units of the Arkansas National Guard to a white high school, which was under a federal court order to desegregate, and placed the school "off limits" to black children. *Cooper v. Aaron*, 358 U.S. 1, 8-9 (1958). Under the governor's orders, the National Guard forcibly restrained black students from entering the high school. *Id.* at 11. Arkansas resolved the conflict only when regular army troops arrived, who replaced the National Guard and remained in Little Rock for over two months to enforce the mandate. *Id.*

60. See J. BARRON, *supra* note 54, at 533 (devoting one paragraph to *Cooper*); G. GUNTHER, *supra* note 53, at 712-13 (according same treatment); W. LOCKHART, *supra* note 53, at 15, 1187 (providing brief notations on *Cooper*); G. STONE, *supra* note 54, at 471-72 (devoting one page to *Cooper*); see also N. DORSEN, P. BENDER, B. NEUBORNE & S. LAW, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* Ch. XXVIII, at 701-09 (4th ed. 1979) [hereinafter N. DORSEN] (detailing resistance to implementation of desegregation mandate).

61. See, e.g., J. BARRON, *supra* note 54, at 520-22 (devoting two pages to separate but equal era out of 299 pages that cover equal protection doctrine); G. GUNTHER, *supra* note 53, at 633-35 (devoting two pages to separate but equal doctrine out of 264 pages that cover equal protection doctrine); W. LOCKHART, *supra* note 53, at 1154-57 (devoting three pages to separate but equal doctrine out of 270 pages that cover equal protection doctrine); G. STONE, *supra* note 54, at 448-61 (devoting 13 pages to separate but equal doctrine out of 255 that cover equal protection doctrine).

62. See, e.g., J. BARRON, *supra* note 54, at 776-80 (providing introductory notes on political and judicial approaches to first amendment issues); G. GUNTHER, *supra* note 53, at 972-85 (according like treatment); G. STONE, *supra* note 54, at 925-38 (furnishing similar notes). The Lockhart text, unlike previous editions, immerses itself immediately in first amendment case law and, consistent with its equal protection coverage, interweaves commentary and background. See W. LOCKHART, *supra* note 53, at 614-1026 (covering first amendment).

63. See, e.g., J. BARRON, *supra* note 54, at 772-800 (detailing early development of first amendment doctrine); G. GUNTHER, *supra* note 53, at 985-1036 (providing same); W. LOCKHART, *supra* note 53, at 630-69 (covering same); G. STONE, *supra* note 54, at 938-85 (examining same).

Included as part of the background are Justice Holmes' seminal contributions to first amendment jurisprudence that helped mold the contemporary "clear and present danger" criteria. See *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (articulating clear and present danger principles for regulation of expression advocating political change); *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting) (arguing that government may punish expression only if it produces or intends to produce clear and present danger of effectuating certain evils); *Schenck v. United States*, 249 U.S. 47, 51-52

textual space to recount the persecution of political dissidents in the 1920s suggests that understanding the history of first amendment analysis is essential to an appreciation of the present realities of expressive liberty.⁶⁴ Exclusion or diminution of comparable historical circumstances concerning jurisprudential contributions to or compounding of racial injustice intimates that such history is relatively insignificant or less pertinent to modern understanding. In contrast with the fuller factual setting in which formative first amendment principles are recounted, early but enduring state action concepts are presented without reference to the harsh context that begot them.⁶⁵ Judicial invocation of limiting principles such as state action, in response to acts of racial terrorism,⁶⁶ seems no less pertinent to understanding equal protection's evolution as early political persecution is to comprehending the development of first amendment doctrine.⁶⁷

Arguably, if an editorial choice must be made between examining

(1919) (holding that expression urging obstruction of draft is not protected by first amendment).

For coverage of this material in constitutional law texts, see J. BARRON, *supra* note 54, at 772-73, 775, 935-39; G. GUNTHER, *supra* note 53, at 986-87, 991-94, 1005-06, 1008-11; W. LOCKHART, *supra* note 53, at 630-31, 637-40, 644, 647-50; G. STONE, *supra* note 54, at 943-44, 950-52, 954-59, 960-64.

Missing, although similarly useful in appreciating the course of doctrinal development, is Holmes' uncharitable depiction of equal protection as the "last resort of constitutional arguments." *Buck v. Bell*, 274 U.S. 200, 208 (1927).

64. See, e.g., Collins, *The Press Clause Construed in Context: The Journalists' Right to Access to Places*, 52 Mo. L. Rev. 751, 755-65 (1987) (stating that constitutional interpretation requires courts to accord great weight to historical background of text); Cross & Griffin, *A Right of Press Access to United States Military Operations*, 21 SUFFOLK U.L. REV. 989, 990-93, 1007-18 (1987) (emphasizing need for judges to understand history and underlying principles of first amendment to relate them to modern circumstances); Denbeaux, *The First Word of the First Amendment*, 80 Nw. U.L. REV. 1156, 1156-58, 1162-71 (1986) (arguing that constitutional restraint on congressional and judicial ability to abridge speech understandable only with appreciation for history of law and its evolution in 20th century).

65. See *Civil Rights Cases*, 109 U.S. 3, 11-17 (1883) (holding that state, but not private, action is prohibited by fourteenth amendment).

66. See *United States v. Cruikshank*, 92 U.S. 542, 556 (1875) (holding that whites who conspire to prevent blacks from voting by threats of murder and false imprisonment are not in violation of Constitution). The Court characterized the conflict as one between private citizens and concluded that the federal government has no role in such disputes. *Id.* at 555. The brutal circumstances begetting *Cruikshank* are amplified in *D. BELL, AND WE ARE NOT SAVED* 265 n.7 (1987).

67. Formative first amendment doctrine, although providing some of the key terms for modern review, was notable for its intolerance of political dissent. See *Schenck v. United States*, 249 U.S. 47, 49 (1919) (holding that political dissidents expressing opposition to draft may be prosecuted under Espionage Act). In its early form, the clear and present danger test accommodated the prosecution of persons publicly expressing their disagreement with government policy. See *id.* at 52 (holding that Congress has right to prevent speech that will result in substantive evils). The standard, as first enunciated by Justice Holmes, was concerned with the perceived bad tendency of speech. *Abrams v. United States*, 250 U.S. 616, 627-29 (1919) (Holmes, J., dissenting). Early doctrinal renditions countenanced the conviction of Eugene Debs, a Socialist candidate for president who, in 1920, received nearly one million votes while imprisoned. Kalven, *Ernst Freund and the First Amendment Tradition*, 40 U. CHI. L. REV. 235, 237-

the historical development of first amendment and fourteenth amendment jurisprudence, enrichment of the latter may be the apter choice. Because first amendment jurisprudence has addressed and resolved much of its early doctrinal deficiencies,⁶⁸ the imperative of understanding its original insensitivity and unresponsiveness to oppression may be comparatively reduced. Conversely, fourteenth amendment jurisprudence now as before largely evades confrontation with the significance of race.

C. *The Result: Evasion*

Modern formulations of discriminatory intent⁶⁹ and color-blind criteria⁷⁰ demonstrate that contemporary equal protection analysis is linked to, rather than severed from, earlier jurisprudential responses to racial injustice. The resultant doctrine, even if projecting an imagery of fairness and sensitivity, facilitates avoidance of enduring reality.⁷¹ Consistent with more than a century of fourteenth amendment jurisprudence, legal education has reinforced patterns of denial and evasion.⁷² It is unlikely that the actualities of

43 (1973) (describing prosecution of Debs as equivalent to sending Senator George McGovern to jail for his criticism of Vietnam War).

68. The modern clear and present danger test, for example, now incorporates an immediacy requirement that precludes suppression of dissidents whose threat to the established order is remote. See *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (incorporating principles of Justices Brandeis' and Holmes' concurring opinion in *Whitney v. California*, 274 U.S. 357, 372-73 (1927) (Brandeis, J., concurring) (distinguishing between remote act of assembling alternative political group and acts that are actual threats to public order)).

69. Despite evidence suggesting deep societal prejudices, the Supreme Court has refused to remedy race-based discrimination without a showing that the discrimination was intentional. See *Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985) (reaffirming requirement of discriminatory intent to establish violation of fourteenth amendment); *Arlington Heights v. Metropolitan Hous. Dev.*, 429 U.S. 252, 263-71 (1977) (holding that racially discriminatory intent is required to show fourteenth amendment violation); *Washington v. Davis*, 426 U.S. 229, 238-40 (1976) (adopting discriminatory purpose test and holding that racial impact alone is insufficient). For a thorough discussion and critique of the Court's intent requirement, see generally Comment, *supra* note 34.

70. Although in *Steel Workers of America v. Weber*, 443 U.S. 193 (1979), the Court held that Title VII does not prohibit race-conscious affirmative action plans to eliminate segregated job categories, recent decisions retreat from general concepts of preferential treatment for blacks and favor instead a color-blind approach to race related constitutional analysis. See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (plurality opinion) (applying race-conscious remediation subject to standard of racial neutrality); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-80 (1986) (plurality opinion) (holding that any program to remedy past discrimination must be narrowly tailored, regardless of which race is to receive benefit or burden). But see *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3010 (1990) (upholding race-conscious policy promoting important government interest unrelated to remediation of societal discrimination).

71. See *infra* notes 115-26 (discussing impact of color-blind criteria); *infra* notes 80-93, 109 (discussing effect of discriminatory intent criteria).

72. Absent meaningful augmentation in the classroom, coverage of race and its relation to the Constitution is dictated by the mostly underdeveloped attention provided by the handful of texts analyzed in *supra* notes 53-75 and accompanying text.

racial jurisprudence will be discerned or communicated by a legal education system that itself evinces intellectual malnourishment on the subject.

Modern jurisprudence evidences few signs of coursing toward a meaningful acknowledgement of and response to the realities of racism and racial discrimination that have been mostly denied or evaded for over two centuries. Investment in a discriminatory intent standard actually confounds the possibility that a persisting legacy of racial injustice will be constitutionally significant. Because modern prejudice is a subtle and disguised practice,⁷³ a judicial standard effective in discerning only overt or indisputable motive suggests that modern equal protection jurisprudence is merely an extension of constitutional business as usual.⁷⁴ To the extent that intent-based inquiry effectively avoids rather than confronts unsettling racial questions, it reveals itself as the sophisticated grandchild of the separate but equal doctrine. As a predicate for constitutional disengagement, motive-referenced criteria afford an ideal methodology for restoring equal protection analysis to the deferential model endorsed in *Plessy*.

Absent overt discrimination or a rare instance of undeniably illegal purpose, the standard so devitalizes equal protection that constitutional protection of minority interests is inconsequential.⁷⁵ Because its primary utility is to avoid traditional equal protection

73. As many scholars have noted, discrimination appears in more forms than simple overt discrimination. See Freeman, *supra* note 7, at 1051-52 (explaining that perpetrator perspective, which relies on finding of intent, fault, and causation, neglects fact of embedded and enduring conditions associated with that problem of discrimination); Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987) (noting that injury of racial inequality exists irrespective of motive); see also *supra* notes 35-37, 73, 100, 127, 133-40 (discussing difficulty of identifying and proving modern racism).

Members of Congress, in enacting Title VII of the 1964 Civil Rights Act, noted that "overt or covert, discriminatory selection devices, intentional or unintentional, generally prevail throughout the major part of the white economic community. Deliberate procedures operate together with built-in administrative processes through which non-white applicants are automatically excluded from job opportunities." S. REP. NO. 867, 88th Cong., 2d Sess. 24 (1964) (statement of Sen. Clark). The Supreme Court has reiterated the point in upholding disparate impact Title VII claims, noting that discriminatory effects are caused by systems of discrimination rather than simple intentional wrongs. *Connecticut v. Teal*, 475 U.S. 440, 447 n.8 (1982). Nonetheless, the Court has refused to factor such societal realities into its equal protection analysis.

74. Business as usual consists of the persistent subordination, since the republic's formation, of the interests of racial justice. Such ordering of priorities is examined in Brooks, *Racial Subordination Through Formal Equal Opportunity*, 25 SAN DIEGO L. REV. 879 (1988).

75. See *Washington v. Davis*, 426 U.S. 229, 234-45 (1976) (holding no equal protection violation when police department's employment test had disproportionate impact); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 18-26 (1973) (holding that underfunded and consequently unequal school districts do not present equal protection problem when circumstance results from economic factors rather than provable discrimination); see also Lawrence, *supra* note 73, at 320-25 (stating that intent requirement overlooks unconscious racism, which is more substantial influence in modern times than overt discrimination).

claims and to invalidate race-conscious remediation, motive-based inquiry, like its analytical predecessors, denies, evades, and accommodates rather than confronts the legacy and enduring reality of racial discrimination and consciousness.⁷⁶ Compounded by newly fashioned color-blind criteria responding to affirmative action, contemporary jurisprudence is distinguished from its analytical past more by rhetoric than actual result.

II. REINVESTING IN DISCREDITED CONSTITUTIONAL STOCK

A. Overview: *A Jurisprudential Portfolio of Denial and Evasion*

The physiognomy of racial jurisprudence over the course of fourteenth amendment history has varied. After momentary attentiveness to official classifications connoting inferiority,⁷⁷ the Supreme Court accommodated what it perceived as "mere discriminations"⁷⁸ and then formulated the separate but equal doctrine⁷⁹ that, for nearly half of the fourteenth amendment's tenure, made the provision essentially irrelevant to race. Following a brief interval in which it advanced the desegregation principle and confronted overt racial prejudice and discrimination,⁸⁰ the Supreme Court reverted to deference to and accommodation of majority interests by investing in motive-based criteria.⁸¹ Forceful application of equal protec-

76. The Court's approach to equal protection claims before *Brown* openly affirmed racial stratification in American society. See *Berea College v. Kentucky*, 211 U.S. 45, 53-58 (1908) (upholding state statute forbidding operation of school that taught both white and black students); *Plessy v. Ferguson*, 163 U.S. 537, 548-52 (1896) (holding official segregation of rail cars constitutional when equal accommodations provided).

77. See *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (holding that official discrimination is impermissible insofar as it "impl[ies] inferiority in civil society" and takes "steps towards reducing [blacks] to the condition of a subject race").

78. See *Civil Rights Cases*, 109 U.S. 3, 25 (1883) (stating segregated public venues, including theaters and passenger trains, constituted "mere discriminations" that culture had always tolerated).

79. See *Plessy*, 163 U.S. at 545, 548-52 (validating official policy requiring segregation on basis of race and distinguishing between constitutionally required civil and political equality as opposed to social inequality).

80. The constitutional mandate to desegregate public schools commenced in 1954. See *Brown v. Board of Educ.*, 347 U.S. 483, 493-96 (1954) (holding separate schools inherently unequal); see also *Green v. County School Bd.*, 391 U.S. 430, 439 (1968) (insisting on desegregation remedies that effect immediate results); *Rogers v. Paul*, 382 U.S. 198, 199-200 (1965) (ordering immediate transfer of petitioning students who still attended segregated schools); *Goss v. Board of Educ.*, 373 U.S. 683, 686-89 (1963) (invalidating policy that allowed students to transfer out of school where student was in minority because such policy only perpetuated dual system). For a discussion and review of cases during this period, see generally Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193 (1964). By the 1970s, desegregation largely had been curtailed pursuant to the introduction of standards requiring proof that segregation was the consequence of discriminatory intent. See *infra* notes 112-26 and accompanying text (discussing Supreme Court's insistence on *de jure/de facto* distinction and adverse impact of such distinction on desegregation mandate).

81. See *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (holding city's denial of request to rezone site for integrated low cost housing not to

tion principles is now reserved for race-conscious remedial policies and initiatives calculated to account for a legacy of racial discrimination and disadvantage.⁸² Now as before, history discloses that the Court rarely has used equal protection analysis to account meaningfully for minority interests. For the most part, the Court's analysis has accommodated society's inclination toward race-dependent practices.

Although doctrine and criteria have changed in response to altered circumstances, they consistently have operated to evade confrontation with racial injustice.⁸³ The significance of fourteenth amendment equal protection, as a consequence, continues to be effectively denied. Modern insistence upon proof of discriminatory intent and color-blindness, making equal protection unresponsive to claims of discrimination against minorities but attentive to claims of disadvantage to the dominant race, reinvests in supposedly discredited jurisprudential stock.

Equal protection jurisprudence exemplifies constitutional adaptability to altered societal circumstances,⁸⁴ but in a way that perpetuates dominant priorities and advantage. Insistence on constitutional color-blindness,⁸⁵ devolution of the desegregation mandate,⁸⁶ and emergence of motive-dependent criteria⁸⁷ have all steered the evolutionary process to avoid reckoning with racial injustice.⁸⁸ The re-

be racially motivated). The official policy of strict scrutiny, reserved for instances when discriminatory purpose is established, operates only rarely with respect to minority claims. See *infra* notes 135-40 and accompanying text (citing cases that confront racial intent). When wrongful motive is not demonstrated, review devolves to a mere rationality standard. See *Arlington Heights*, 429 U.S. at 265 (stating arbitrariness of irrationality must be shown).

82. See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 486 (1989) (applying strict scrutiny to remedial policy overtly classifying on basis of race).

83. See generally Lawrence, "Justice" or "Just Us": *Racism and the Role of Ideology*, 35 STAN. L. REV. 831 (1983) (tracing development of equal protection doctrine and its inability to confront racism). Equal protection methodology has changed since *Plessy v. Ferguson*, 163 U.S. 537 (1896) (establishing separate but equal doctrine), through *Brown v. Board of Education*, 347 U.S. 483 (1954) (overruling *Plessy* and holding that separate is inherently unequal in education) and to its present state in *Washington v. Davis*, 426 U.S. 229 (1976) (adopting discriminatory intent standard).

84. Compare *Plessy*, 163 U.S. at 540 (upholding state law requiring railway passenger cars to have "equal but separate accommodations for the white, and the colored races" on equal protection grounds) with *Brown*, 347 U.S. at 487-88, 495 (invalidating state law requiring segregation of public school children solely on basis of race on equal protection grounds).

85. See *infra* notes 101-11 and accompanying text (discussing emphasis on racial neutrality by modern equal protection jurisprudence).

86. See *infra* notes 94-126 and accompanying text (discussing judicial implementation of school desegregation mandate).

87. See *infra* notes 127-50 and accompanying text (discussing operation of discriminatory purpose standard).

88. See, e.g., *Board of Educ. of Oklahoma City v. Dowell*, 111 S. Ct. 630, 637 (1991) (stating that federal judicial supervision of school systems was intended as "temporary measure to remedy past discrimination" so desegregation decree may be dissolved if unitary status achieved, decree complied with "for a reasonable period of time," and resegregation

generative capacity of jurisprudential patterns of evasion should not be surprising given the several decades of constitutional law amenable to the formulation of race-dependent policies and practices.⁸⁹

Justice Blackmun recently questioned "whether the majority still believes that race discrimination . . . is a problem in our society, or even remembers that it ever was."⁹⁰ Institutional reaction has been predictably defensive.⁹¹ Justice Blackmun's concern is justified insofar as equal protection jurisprudence seldom has acknowledged racism as a central societal feature.⁹² Modern jurisprudential references to racial discrimination in the past tense avoid and perpetuate the reality of enduring prejudice.⁹³

B. Desegregation: The Imagery of Constitutional Achievement

The fourteenth amendment originally responded to what was perceived as a legally deficient political and economic system.⁹⁴ So

recurs from influences unrelated to official action); *City of Richmond v. J. A. Croson, Co.*, 488 U.S. 469, 505-06 (1989) (holding that official racial classification for remedial purpose is subject to strict judicial scrutiny and thus must be supported by compelling government interest); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1986) (holding that collectively bargained affirmative action program resulting in lay-offs of senior non-minority employees violates equal protection clause absent showing of prior intentional discrimination).

89. See *supra* notes 10, 21, 55, 94 and accompanying text (discussing Supreme Court's early treatment of fourteenth amendment).

90. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting) (stating that case record demonstrates overt, institutionalized discrimination in work environment organized on principles of racial stratification and segregation resembling "plantation economy").

91. Justice White, writing for the majority and responding to Justice Blackmun's point, depicted the allegation as "hyperbolic" and "inapt." *Id.* at 649 n.4.

92. See Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 568-77 (1984) (stating that discrimination remedies are engineered to provide solution with most utility to society and least amount of disruption and thus deny oppressive realities). For discussion of the dominant role that racism has played in American society, see D. BELL, *supra* note 10, at 1-47 (discussing racial patterns in American law and role law has played in systematic subordination of blacks).

93. The Court's approach to racial discrimination tends to indicate that discrimination is a phenomenon of the past that may be remedied, rather than an on-going, pervasive societal reality. See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 499 (1989) (stating there is "no doubt [about] the sorry history of both private and public discrimination") (emphasis added); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 278 n.5 (1986) (stating that "[n]o one disputes that there has been racial discrimination in this country") (emphasis added); *Rogers v. Lodge*, 458 U.S. 613, 631 n.1 (1982) (Stevens, J., dissenting) (stating that "[c]ertain vestiges of discrimination—although clearly not the most pressing problem facing black citizens today—are a haunting reminder of an all too recent period of our nation's history") (emphasis added); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 293-94 (1970) (stating that equal protection clause must be interpreted with view of assuring all persons equal protection of laws "in Nation confronting a legacy of slavery and racial discrimination") (emphasis added). But see *City of Lockhart v. United States*, 460 U.S. 125, 137 (1983) (Marshall, J., concurring in part and dissenting in part) (stating his disagreement with majority opinion, which, in his view, would permit states to adopt election procedure "that perpetuate[] existing discrimination") (emphasis added).

94. The fourteenth amendment was enacted as a general guarantee of life, liberty, and property of all persons, but minority interests were not effectively enforced for almost a cen-

conceived, it was a charter for limited rather than comprehensive equality.⁹⁵ Jurisprudential glosses and renderings, reflecting dominant race-dependent attitudes and customs, have stunted the fourteenth amendment's development so that it has yet to meet even its qualified aims. Race-conscious political disempowerment and foreclosure of economic opportunity has proceeded to a significant extent without constitutional restraint.⁹⁶ Given the northern states' role in introducing the concept of official segregation to the nation,⁹⁷ and their rampant racial phobias⁹⁸ that influenced the fram-

ture. See D. BELL, *supra* note 10, at 33-34; see also *supra* note 4 (discussing original intent of fourteenth amendment). Early fourteenth amendment jurisprudence responded more to corporate and economic interests than to minority interests. D. BELL, *supra* note 10, at 33-34. Judicial interpretation of legislation based on the fourteenth amendment so narrowed its scope as to render its protection virtually meaningless for blacks. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (enunciating separate but equal doctrine); *United States v. Harris*, 166 U.S. 629 (1883) (holding conspiracy among private citizens to deprive another citizen of equal protection is not constitutional violation); *The Civil Rights Cases*, 109 U.S. 3 (1883) (denying constitutional remedy when private action resulted in segregation of public accommodations or venues); *United States v. Cruikshank*, 92 U.S. 542 (1876) (establishing state action limitation to fourteenth amendment). For an informative review of the Court's earliest use of the equal protection clause, see N. DORSEN, *supra* note 60, at 57-58.

95. See *Buck v. Bell*, 274 U.S. 200, 208 (1927) (stating that equal protection is "last resort of constitutional arguments").

Most of the framers of the fourteenth amendment agreed that it would secure equality with respect to basic economic opportunity and equal standing before the law. See R. BERGER, *GOVERNMENT BY JUDICIARY* 22 (1977). The goal was threefold: 1) to secure from possible repeal the Civil Rights Act of 1866 which guaranteed contractual and property rights, 2) to facilitate equal opportunity for material self-development, and 3) to ensure equal standing before the law. CONG. GLOBE, 39th Cong., 1st Sess. 474-75 (1866) (statement by Sen. Trumbull) (opening debate on Civil Rights Act of 1866 and stating that Act is intended to give effect to abstract truths of fourteenth amendment). See generally Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949) (stating that Civil Rights Act of 1866 is intimately related to creation of fourteenth amendment and that debates on Act provide valuable insight into intent of framers of fourteenth amendment).

96. See *City of Richmond v. J. A. Croson*, 488 U.S. 469, 503 (1989) (acknowledging "dearth" of economic opportunities for minorities); *Fullilove v. Klutznick*, 448 U.S. 448, 490 (1980) (stating that Congress has latitude to try new techniques such as affirmative action to accomplish remedial objective of equality of economic opportunity); see also D. BELL, *supra* note 10, at 589-95 (observing that economic disadvantage of blacks is directly related to racial discrimination in employment and black economic and social progress has proved dependent on what is in best interest of whites); Olsen, *Employment Discrimination Litigation: New Priorities in the Struggle for Black Equality*, 6 HARV. C.R.-C.L. L. REV. 20, 23, 25 (1970) (comparing statistics for whites and non-whites in different employment sectors and determining that blacks consistently have been second-class workers in unskilled, unattractive, and poorly paid positions); L. THUROW, *POVERTY AND DISCRIMINATION* 111-39 (1969) (concluding that 40% difference in incidence of poverty between whites and African-Americans is directly and exclusively attributable to discrimination).

97. Official segregation of public education was established and upheld prior to the Civil War. See *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 209-12 (1849) (holding that city can require black children to attend segregated schools to the extent they are equal).

98. Blacks were commonly perceived in the North not only as inferior but also as an economic threat to whites who enjoyed a monopoly on employment. See R. BERGER, *supra* note 95, at 12 (addressing history of American perceptions and treatment of blacks prior to and contemporaneously with fourteenth amendment's emergence); L. LITWACK, *THE AFTERMATH OF SLAVERY* 276-77 (1979) (illustrating intense hatred toward blacks in first years of emancipation that manifested itself, among other ways, in severed ears, mutilated sex organs,

ing of the fourteenth amendment,⁹⁹ it is not surprising that segregation and discrimination in employment, education, and housing whether by law or custom have evolved as universal societal realities.¹⁰⁰ Given deeply etched and constitutionally facilitated distinctions along racial lines, dismantling the legacy of racism requires more than a declaration that "separate is inherently unequal" and a passing and regionalized commitment to eliminate its vestiges "root and branch."¹⁰¹

Announcement of the desegregation mandate represented a significant albeit temporary animation of equal protection guarantee. From the outset, however, desegregation was captive to judicial perceptions of what the dominant culture would countenance. Recognizing how entrenched racism was, the Supreme Court introduced desegregation cautiously in what proved to be a failed effort to minimize opposition to the mandate.¹⁰²

The Court delayed fashioning remedies rather than demand im-

burning at stake, forced drowning, and open display of severed heads); see also *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 198-200 (1944) (addressing union discrimination in representing racial minorities); CONG. GLOBE, 39th Cong., 1st Sess. 257 (1866) (statement of Sen. Jolian) (speaking to proverbial societal hatred of blacks). See generally W. GOULD, *BLACK WORKERS AND WHITE UNIONS* (1977) (delineating history of racial discrimination in American unions). For additional statements concerning racial phobias, see CONG. GLOBE, 39th Cong., 1st Sess. 218, 739, 911, 1437, 2448, 2799 (1866).

99. President Lincoln, for instance, noted that "there is an unwillingness on the part of our people, harsh as it may be, for you freed colored people to remain with us . . . [E]ven when you cease to be slaves, you are yet far removed from being placed on an equality with the white race . . . I cannot alter it if I would." C. WOODWARD, *THE BURDEN OF SOUTHERN HISTORY* 81 (1960) (recounting Lincoln's address to group of black leaders at White House). The idea of separating the races prompted Lincoln to propose that blacks should be colonized abroad or segregated in colonies at home. *Id.*

100. See *Croson*, 488 U.S. at 503 (stating that numerous explanations exist for "dearth" of minority participation in local construction industry, "including past societal discrimination in education and economic opportunities"); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting) (noting segregation of employees' housing and dining facilities and stratification of jobs along racial and ethnic lines).

It has been observed that segregation in the North was actually more entrenched than in the South where the custom was largely ceremonial. See G. MYRDAL, *AN AMERICAN DILEMMA* 341 (1942) (providing extensive overview of racism in different sectors of society); U.P.I. Wire Serv., (May 18, 1990) (describing research report concluding that housing patterns in Baltimore and surrounding counties are "hypersegregated"); Lawrence, *supra* note 73, at 326-28 (arguing that unconscious racism is pervasive reality that affects all areas of society).

101. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 459 (1979) (holding city school board obligated to eliminate vestiges of official segregation that endured pursuant to its post-*Brown* manipulation of attendance zones).

102. See *Brown v. Board of Educ.*, 349 U.S. at 294, 299-301 (1955) (noting difficulties in crafting general desegregation policy and depending on district courts to fashion remedies in accordance with specific needs, concerns, and abilities of each school district).

A sense that the public's response to *Brown* would be electric and widely divergent owed to a sense that social engineering was the work of the legislature and not the courts. See A. T. MASON, *THE SUPREME COURT FROM TAFT TO WARREN 189-205* (1958) (discussing Court's activist role in requiring desegregation). The initial decision in *Brown* was delayed a year and the order for relief put off yet another year. Affected communities even then responded with

mediate compliance.¹⁰³ State and local input was solicited in hope that communities most affected and potentially antagonized by the constitutional demand would contribute to and participate constructively in the remedial process.¹⁰⁴ The requirement of desegregation "with all deliberate speed" further couched the new model of equal protection in terms of sensitivity to the dominant culture.¹⁰⁵

Despite the Court's calculated importuning, massive resistance, delay, and tokenism ensued.¹⁰⁶ The eventual determination that "[t]he time for mere 'deliberate speed' " had expired,¹⁰⁷ and insistence on remediation that "worked now,"¹⁰⁸ emerged more than a decade later and operated but briefly.¹⁰⁹ The desegregation experience was confined primarily to the South, where results were mixed at best.¹¹⁰ Pertinent equal protection principles may have erased

resistance and evasion. See A. LEWIS, *PORTRAIT OF A DECADE: THE SECOND AMERICAN REVOLUTION* 32-45, 104-10, 251-58 (1964) (discussing southern reaction to desegregation mandate).

The South's intense resistance to desegregation was reflected in the Southern Manifesto of 1956 that had been signed and filed by 100 senators and congressmen from the 11 states that had made up the confederacy. The Manifesto accused the Court of unwarranted decisions in the public school cases. *Id.* at 44. Southern leaders believed that the Court had no power to make such decisions and had substituted its personal, social, and political ideas for the established law of the land. *Id.* at 44-45.

103. *Brown*, 347 U.S. at 495 (recognizing that framing of relief "presents problems of considerable complexity" necessitating delay in providing appropriate relief until further arguments were completed in term).

104. See *id.* at 495-96 (requesting information and recommendations from affected states and localities).

105. *Id.* at 301. Although mandating immediate desegregation, the Court provided for additional time as found necessary by the school boards. *Id.* at 300. The mixed signals were capitalized on by state and local officials who continued their discriminatory practices.

106. See *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 845 n.3 (5th Cir. 1964) (consolidating seven similar cases from Alabama and Louisiana in which school boards had failed to desegregate meaningfully ten years after *Brown*). By 1965, in Alabama and Louisiana only .43% and .69%, respectively, of eligible black children were actually enrolled in racially mixed schools. *Id.* For a discussion of the aftermath of the *Brown* decision, see N. DORSEN, *supra* note 60, at 696-719 (providing background on state reaction to *Brown* desegregation mandate).

107. *Griffin v. Prince Edward County School Bd.*, 377 U.S. 218, 234 (1964) (repudiating official closure of public schools to avoid desegregation and tuition grants and tax breaks to whites so they could attend private white schools).

108. *Green v. County School Bd.*, 391 U.S. 430, 438-39 (1968) (characterizing school board's response to "all deliberate speed" as "deliberate perpetuation" of dual system).

109. A few years after insisting on remedies that would have an immediate effect, the Court limited the desegregation mandate to *de jure* segregation and thereby profoundly restricted its reach. See *infra* notes 118-25 and accompanying text (discussing negative effects of *de jure* segregation requirement on blacks who exist in *de facto* stratified society).

110. See W. HAWLEY, *STRATEGIES FOR EFFECTIVE DESEGREGATION: LESSONS FROM RESEARCH* 4 (1983) (stating that "greatest progress in desegregation has been in the South"); G. ORFIELD, *PUBLIC SCHOOL DESEGREGATION IN THE UNITED STATES, 1968-1980* 1-12 (1983) (stating same); Lickman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1465 (1990) (stating that school desegregation "lives quietly in the Confederate South" and that "desegregation persists in southern rural areas where substantial numbers of black Americans continue to reside" and in southern urban areas where school districts organized in the 1970s encompass the suburbs); Orfield, *School Desegregation in the 1980's*, *EQUITY & CHOICE*, Feb. 1988, at 25, 26 (stating that as of 1984, less than 30% of all black children in

some of the most visible symptoms of a race-conscious society but, as evidenced by their subsequent delimitation, they failed to confront racism as a pervasive and deeply-rooted cultural phenomenon.¹¹¹

C. Constitutional Retraction and Counter-Insurgency

The argument has been advanced that the Burger Court did not rebel against or redact the Warren Court's vitalization of the fourteenth amendment.¹¹² It also has been suggested that instead of retreating from and rewriting the equal protection principles of its predecessor, the Burger Court actually reinforced and broadened the ambit of jurisprudence securing racial justice.¹¹³ Such characterizations are at odds, however, with patent and inexorable qualifications of the desegregation mandate that began in the 1970s.

While professing fealty to the importance of education and equal opportunity emphasized in *Brown*,¹¹⁴ the Burger Court formulated principles that narrowed the application of desegregation to circumstances that had become largely nonexistent.¹¹⁵ The potential for

South attended 90%-plus minority schools compared to over 55% in Northeast); N.Y. Times, Dec. 17, 1988, at 4, col. 1 (reporting that experts say desegregation is "all but dead in cities like New York, Chicago, Los Angeles, Washington, and Philadelphia, which have heavily black and hispanic populations"). But see U.P.I. Wire Serv., (Apr. 15, 1990) (describing report concluding that public schools in metropolitan Atlanta "are among the most segregated and are systematically unequal"); The Christian Science Monitor, Nov. 20, 1986, at 1, col. 1 (stating that many public schools in rural South have never been touched by desegregation mandate). Because of the "white flight" phenomenon, large urban school districts in the North and South experienced steadily decreasing percentages of white students and were therefore difficult to integrate. See Ravitch, *The "White Flight" Controversy*, 51 PUB. INTEREST 135, 145-47 (1978). In the late 1970s, the percentages of minority children in the seven largest school districts were: New York City, 69.5%; Los Angeles, 63%; Chicago, 75%; Houston, 65.8%; Baltimore, 75.6%; Dallas, 61.9%; and Cleveland, 62.9%. *Id.*

111. For an understanding of how the desegregation mandate has been restricted, see Board of Educ. of Oklahoma City v. Dowell, 111 S. Ct. 630-38 (1991) (allowing school board to cease desegregation efforts after unitary system achieved); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436-37 (1976) (finding duty to desegregate abates once unitary system established); Milliken v. Bradley, 418 U.S. 717, 746-47 (1974) (holding intent to discriminate must be proven in each district and remedy cannot implicate neighboring districts uninfected by illegal motive); Keyes v. School Dist. No. 1, 413 U.S. 189, 208-09 (1973) (requiring *de jure* segregation as prerequisite for desegregation). Such limiting principles have allowed racially separate education to continue as the norm. See *Milliken*, 418 U.S. at 782 (Marshall, J., dissenting) (stating Court's ruling is giant step backwards in reaching racial desegregation goal).

112. V. BLASI, *THE BURGER COURT* vii (1983) (noting that there was no "counter-revolution" by Burger Court against liberal ideal of human dignity and no "counter-revolution" to Court's activist role in promoting that ideal).

113. See *id.* at 199 (arguing that Burger Court's passive approach indicates its acceptance of Warren Court's premises in racially sensitive areas).

114. See *Brown v. Board of Educ.*, 347 U.S. 483, 493-96 (1954) (citing psychological tests indicating legally segregated education engenders sense of inferiority and lack of motivation).

115. Principles limiting the desegregation mandate to *de jure* segregation essentially restricted its utility to instances of overt discrimination. See generally Pasadena City Bd. of Educ.

Brown to reach the disparity of educational opportunity was so curtailed that the desegregation mandate devolved into a largely empty constitutional demand.¹¹⁶ As equal protection doctrine reverted to a more traditional model that was sensitive to and accommodated the dominant culture, a short-lived doctrinal revolution was overtaken by a constitutional counter-insurgency.¹¹⁷

Central to the demise of the *Brown* mandate was the concept of *de facto* segregation,¹¹⁸ which narrowed constitutional obligations to instances where segregative intent was proven.¹¹⁹ Remedial responsibilities thus were confined to contexts in which racially separate education had been a function of official prescription or overt segregation.¹²⁰ Differentiation between *de jure* and *de facto* segregation, however, is largely illusory.¹²¹ A determination that residential seg-

v. Spangler, 427 U.S. 424, 431-40 (1976) (holding that city is under no duty to desegregate, despite resegregation of system, unless official intent to discriminate is again proven).

116. Taken to its logical end, the emphasis in *Brown* on equal educational opportunity would have afforded a premise for insisting on elimination of funding disparities among school systems. By refusing to consider education a fundamental right or to regard wealth as a suspect classification, the Court precluded such doctrinal potential. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28-29, 36-37 (1973) (stating that wealth classification has none of traditional indications of suspectness). The Court reasoned that residence in a district with less taxable income than other districts does not translate into a condition resulting from officially imposed disabilities, a history of discrimination, or political powerlessness. *Id.* at 36-37.

117. See Lawrence, *supra* note 73, at 323-25 (arguing that Court's adoption of intent based standard ignores profound effect of racism on culture and its unconscious workings). The Court's present ideology masks and denies the reality of oppressive social and economic relations and intimates that they are fair. *Id.* at 325.

118. *De facto* ("by the facts") segregation "occurs because of housing and migration patterns and is unconnected to any purposeful governmental action to racially segregated schools." R. ROTUNDA, J. NOWAK & N. YOUNG, 2 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.9, at 413 (1986).

De facto segregation is distinguished from *de jure* ("by law") segregation, which refers to segregation that is the product of some purposeful act by government authorities. *Id.* Laws that intentionally discriminate against racial and ethnic minorities are *de jure* discrimination. Compare *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (holding that city prosecutor violated equal protection clause by applying city ordinance in grossly discriminatory manner) with *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (holding state miscegenation law unconstitutional on its face because of invidious racial classification). To be entitled to the desegregation remedies provided by law, a plaintiff is required to make "a finding of intentionally segregative action." *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208-09 (1973).

119. If segregation is *de jure*, it violates the equal protection guarantee and, if necessary, the courts will intervene to remedy the situation. See *Brown v. Board of Educ.*, 347 U.S. 483, 493, 495 (1954) (striking down state law requiring segregation of public school children solely on basis of race). But if a school system is characterized by *de facto* segregation, no constitutional violation exists and the courts will not intervene. See *Keyes*, 413 U.S. at 208-09 (requiring that plaintiffs in *de facto* segregated school system show "intentionally segregative action" by government).

120. But see *Keyes*, 413 U.S. at 218-19, 229-30 (Powell, J., concurring in part and dissenting in part) (stating that educational opportunity was original concern prompting desegregation and cause does not alter its effect on opportunity).

121. See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 481 (1974) (Powell, J., dissenting) (stating that *de facto* segregation often is indistinguishable in effect from constitutionally impermissible *de jure* segregation); *Spencer v. Kugler*, 404 U.S. 1027, 1029-30 n.1 (1972)

regation is unconnected to state action, for instance, conflicts with the realities of history. Federal policies that prohibited mortgage financing of real estate purchases that would contribute to racially mixed neighborhoods,¹²² judicial enforcement of racially restrictive covenants,¹²³ and official decisions regarding public housing siting and urban development fund allocation,¹²⁴ are all significant instances of official action. Such practices and decisions facilitated what the Court now denominates as "normal patterns of human migration."¹²⁵ Jurisprudence that denies government contributions to modern segregation and acknowledges racial separation as a socie-

(Douglas, J., dissenting) (stating that "categorical distinction between *de jure* and *de facto* segregation is not as clear cut as it would appear").

Black children in northern cities will find little comfort in the assertion that their racial segregation does not violate the fourteenth amendment because "they happen to be born in a *de facto* instead of a *de jure* society." *Keyes*, 413 U.S. at 229-30 (Powell, J., dissenting); see also *id.* at 216 (Douglas, J., concurring) (stating that for purposes of equal protection, there is no distinction between *de jure* and *de facto* segregation as each ultimately is product of state action); Chang, *The Bus Stops Here: Defining the Constitutional Right of Equal Education Opportunity and an Appropriate Remedial Process*, 63 B.U.L. REV. 1, 52 n.159 (1983) (arguing that establishment of government liability for unequal education performance should not rest on *de jure/de facto* distinction, but on determination that government obligation will be breached if education fails to benefit minority students to same extent as their white counterparts); Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 83 n.410 (noting that focus on *de jure* and *de facto* distinction "seemingly mandates an apparent purity of the decisional process while making no assurances as to the outcome of that process").

122. The Federal Housing Administration's lending policies, during years of major black migration from the South, insulated residential loans from "adverse influences" that included "racially inharmonious groups." P. JACOBS, *PRELUDE TO RIOT: A VIEW OF URBAN AMERICA FROM THE BOTTOM* 139-41 (1967). After the Depression, the federal government helped build low-income housing. It made no attempt, however, to reverse or alter segregated racial patterns fixed by private real estate and housing interests. Rather, the government followed the same segregated pattern applied by the banks and mortgage companies. *Id.* at 141-47.

When considering loan applications, federal agents were instructed to discover whether any racially restrictive covenants governed the land. *Id.* at 140. Official policy restricted property ownership to the race for which the property was intended. *Id.* at 140-41. Such control protected against undesirable encroachment and maintained racially separate communities. *Id.* at 140. For a discussion of several studies and polls revealing trends in white flight and resistance to housing integration, see Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245, 253-54 (1974); C. AISROMS, *FORBIDDEN NEIGHBORS* 220-25 (1955) (describing series of devices used to protect exclusiveness of white residential areas).

123. See, e.g., *Barrows v. Jackson*, 346 U.S. 249, 252-60 (1955) (holding that judicial enforcement of race restrictive covenant is state action barred by fourteenth amendment); *Hurd v. Hodge*, 334 U.S. 24, 31-34 (1948) (finding same); *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (finding same).

124. See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 216 (1973) (Douglas, J., concurring) (asserting that state action is present when public funds are used by urban development agency to build "race ghettos"). Not surprisingly, when the *de jure/de facto* distinction emerged, segregation was well-established in northern and western cities. See United States Department of Health, Educ. and Welfare School Enrollment Survey (1971), reprinted in 118 CONG. REC. 563-66 (1972) (statement of Sen. Stennis) (concluding that dual systems still exist and citing race percentage figures for segregation in northern and western cities and identifying hypocrisy of *de facto/de jure* distinction). The study consists of three pages of statistics analyzing the percentages of black students in public schools. *Id.*

125. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436 (1976) (concluding resegregation of public schools is not attributable to state action).

tal norm, further reveals a pattern of review inclined to accommodate the status quo.¹²⁶ Such jurisprudence not only declines confrontation with racial reality but, as evidenced by modern rationales against remediation, may manipulate it for the majority's benefit.

D. The Modern Litany of Denial and Evasion: Motive-Based Inquiry

Despite initial intimations to the contrary,¹²⁷ proof of discriminatory purpose has become a general prerequisite for establishing a claim of discrimination.¹²⁸ Parties alleging equal protection deprivations in housing,¹²⁹ employment,¹³⁰ education,¹³¹ and criminal justice¹³² accordingly face the often impossible task of establishing the existence of wrongful purpose. Investment in motive-based inquiry is disquieting not only because difficulties of proof so substantially impair the vitality of equal protection,¹³³ but because its

126. See *Austin Indep. School Dist. v. United States*, 429 U.S. 990, 994 (1976) (Powell, J., concurring) (noting that most large cities with substantial minority populations have residential areas where certain racial and ethnic groups predominate and "economic pressures and voluntary preferences" are primary determinants of such patterns (citing *Keyes*, 413 U.S. at 224-53 (Powell, J., concurring in part and dissenting in part) (stating that tendency of citizens of common nationality and ethnic origins to form homogeneous residential patterns in American cities is familiar demographic characteristic of this country)); *Spangler*, 427 U.S. at 435 (stating that increased concentration of minorities in public school system apparently resulted from "people randomly moving into, out of, and around the school system" and this "quite normal pattern of human migration" resulted in altered racial composition of some schools); *Milliken v. Bradley*, 418 U.S. 717, 756 (1974) (stating that predominantly black school population in Detroit was "caused by unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of racial fears"). But see *Board of Educ. of Oklahoma City v. Dowell*, 111 S. Ct. 630, 646 (1991) (Marshall, J., dissenting) (rejecting district court's conclusion that racial identity of city's northeast quadrant attributable to "personal preferences, [because] it pays insufficient attention to the roles of the State, local officials, and the Board in creating what are now self-perpetuating patterns of residential segregation" (citation omitted)); *Keyes*, 413 U.S. at 202 (noting that location of schools may influence patterns of residential development and influence composition of inner-city neighborhoods).

127. See *Wright v. Council of Emporia*, 407 U.S. 451, 462 (1972) (rejecting "dominant purpose" analysis of school segregation in favor of analysis based on "effect" of legislative action); *Palmer v. Thompson*, 403 U.S. 217, 224 (1971) (noting extreme difficulty of ascertaining and proving motivation of legislation).

128. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (concluding that discriminatory purpose is necessary for challenged action to be constitutionally significant).

129. See *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268-72 (1977) (holding that respondents failed to show zoning laws were result of discriminatory intent).

130. See *Davis*, 426 U.S. at 245-48 (noting disproportionate impact of employment test constitutionally immaterial absent showing of illegal purpose).

131. See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208-09 (1973) (allocating burden of proving segregative intent to plaintiff).

132. See *McCleskey v. Kemp*, 481 U.S. 279, 292-93 (1987) (allocating burden of proving discriminatory purpose of capital punishment to criminal defendant).

133. See *Lawrence*, *supra* note 73, at 319 (condemning discriminatory purpose requirement in equal protection context for imposing heavy and often impossible burden on party alleging discrimination).

application in other constitutional contexts has been so effectively criticized.¹³⁴ Incongruously, certain critics of intent standards in other constitutional settings have embraced purpose criteria in the context of equal protection.¹³⁵

Illegal motive may be easily disguised by the articulation of a racially neutral purpose.¹³⁶ Searching for illicit motive, when officials are on notice that actual intent only requires concealment to avoid constitutional consequences, is an exercise in futility.¹³⁷ Collective intent, moreover, is largely an illusion.¹³⁸ What motive-based inquiry ultimately does best is shield the dominant culture from otherwise unsettling equal protection demands.¹³⁹ Intent referenced criteria, considered from such a perspective, fit an analytical mold that regularly has forged principles of majoritarian convenience.

Motive-based inquiry facilitates the jurisprudence of denial and evasion by detaching the process of review from the persistent realities and consequences of racism.¹⁴⁰ To the extent that it functions

134. The Court has observed that motive-based inquiry is unacceptable in the first amendment context because "the stakes are sufficiently high to eschew guesswork." *United States v. O'Brien*, 391 U.S. 367, 382-86 (1968) (holding that not only purpose but inevitable effect may render statute unconstitutional when it faces first amendment challenge); see also *Epperson v. Arkansas*, 393 U.S. 97, 112-13 (1968) (Black, J., dissenting) (expressing difficulty in determining motive of statutes prohibiting teaching of evolution theory in public schools).

135. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 702-03 (1981) (Rehnquist, J., dissenting) (identifying difficulty of discerning "actual" purpose of legislators during review of state statutes affecting interstate commerce). But see *McCleskey*, 481 U.S. at 297-99 (Rehnquist, C.J., joining majority in upholding discriminatory sentencing practices absent racially discriminatory purpose). Chief Justice Burger also invested selectively in motive-based inquiry. The Chief Justice, who joined Rehnquist's dissent in *Kassel*, 450 U.S. at 687, supported the majority in requiring proof of discriminatory motive in equal protection cases. See *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268-70 (1977); *Washington v. Davis*, 426 U.S. 229, 239-40 (1976).

136. Although the Court has suggested guidelines for determining discriminatory purpose, *Arlington Heights*, 429 U.S. at 264-68 (stating that racially discriminatory intent can be evidenced by such factors as disproportionate impact, historical background of challenged decision, specific antecedent events, departures from normal procedures, and contemporary statements of decisionmakers), legislative or administrative bodies may be free to reenact the same law with a contrived, race-neutral legislative history. Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 974 (1978). But see Brest, *Reflections on Motive Review*, 15 SAN DIEGO L. REV. 1141, 1144-45 (1978) (expressing doubt that legislature will fabricate acceptable reasons for discriminatory laws).

137. See *O'Brien*, 319 U.S. at 383-84 (dismissing as "guesswork" efforts to decipher legislative intent); cf. *Edwards v. Aguillard*, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting) (noting futility of discerning purpose in first amendment establishment clause cases).

138. See *Aguillard*, 482 U.S. at 638 (Scalia, J., dissenting) (noting that, while formal purpose of statute may be explicitly set forth, subjective motivation impossible to ascertain).

139. See Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1107 (1989) (arguing that intent requirement serves to reinforce and protect many established political and economic values); see also Note, *Liberal Theory as Constitutional Doctrine: A Critical Approach to Equal Protection*, 73 GEO. L.J. 153, 154 (1984) (observing that equal protection guarantees formal equality, contingent on proof of legislative intent, while doctrine of practical equality relies on disproportionate racial impact).

140. See Lawrence, *supra* note 73, at 321-27 (stating that discriminatory intent requirement

as a device for avoiding racial injustice, it differs little in substantive consequence from the separate but equal doctrine.¹⁴¹ Absent proof of discriminatory intent, the Court defers to the status quo as it did under *Plessy*.¹⁴² Like the analysis of a century ago, the Court has created a doctrine that effectively precludes confrontation of racial realities and constitutionally-driven societal change.¹⁴³

The lexicon and results of two decisions separated by nearly a century reinforces a sense of analytical consistency over time, despite modified circumstances and doctrine. In 1896, the Supreme Court in *Plessy v. Ferguson*¹⁴⁴ upheld official segregation as a logical extension of distinctions "in the nature of things."¹⁴⁵ Nearly one hundred years later in *McCleskey v. Kemp*,¹⁴⁶ the Supreme Court confronted racial disparities that resulted from the exercise of prosecutorial discretion in seeking and decisions implementing the death penalty.¹⁴⁷ The Court ignored the dual system of criminal justice that historically operated in the jurisdiction¹⁴⁸ and dismissed the discrepancies as "[a]pparent disparities [that were] . . . an inevitable part of our criminal justice system."¹⁴⁹ By judicial disposition, the past was made irrelevant to the present, and the race-dependent perceptions that define modern circumstances were rendered once again inconsequential for Constitutional purposes.¹⁵⁰

misconstrues "nonintentional," but nevertheless culturally embedded aspect of race discrimination and thus fails to recognize and remedy many discriminatory injuries).

141. Compare *Plessy*, 163 U.S. at 551 (stating that forced separation does not imply inferiority of minority race and "separate but equal" doctrine thus not at odds with fourteenth amendment) with *Davis*, 426 U.S. at 245-48 (holding that police department's written employment test that blacks disproportionately failed not function of discriminatory intent).

142. See *supra* notes 129-32 and accompanying text (discussing equal protection challenges that have failed because of difficulty in proving motive).

143. The effect is subtle insofar as official discrimination is portrayed as constitutionally unacceptable. The Court recently observed that "[t]he law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension." *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2379 (1989) (narrowing statute forbidding discrimination in private contracting so as not to reach post-formation harassment). Given the likelihood that wrongful purpose will not be demonstrated, established practices and policies will seldom be unsettled. See *supra* notes 135-43 and accompanying text (arguing that modern intent requirement shields dominant culture from equal protection remedies).

144. 163 U.S. 537 (1896).

145. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

146. 481 U.S. 279 (1987).

147. *McCleskey v. Kemp*, 481 U.S. 279, 286-87 (1987).

148. *Id.* at 329 (Brennan, J., dissenting) (calling attention to disparate treatment of blacks by Georgia's criminal statutes from colonial period until constitutional invalidation of state's death penalty in 1972).

149. *Id.* at 312.

150. The Court was thus unable to discern the basic truth that effective legal advice to a black defendant, charged with a capital offense against a white victim, would communicate the significance of race. See *id.* at 294-95 & n.15 (explaining inability to draw credible inference from statistics).

E. Beyond Denial and Evasion: Affirmative Action and the Manipulation of Reality

Modern jurisprudence is distinguished from its discredited past by the outward demeanor of standards that were formerly tied overtly to racial superiority and inequality¹⁵¹ but are now packaged in terms of racial neutrality.¹⁵² The inaptness of color-blindness to modern circumstances may be less obvious than its compatibility with aims of racial justice when the concept was rejected a century ago.¹⁵³ Principles of neutrality that would have invalidated official segregation in the late nineteenth century now operate to defeat the viability and vitality of affirmative action.¹⁵⁴

The case against race-conscious remediation is premised on the articulated concern that it creates unfair advantages for minorities,¹⁵⁵ stigmatizes and stereotypes its intended beneficiaries,¹⁵⁶ harms innocent victims,¹⁵⁷ and fosters tribal politics.¹⁵⁸ Upon close

151. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (objecting to separate but equal doctrine but articulating perception of white race's superiority).

152. Racial neutrality presents an attractive ideal, but actually defeats race-conscious initiatives that seek to overcome racial discrimination. See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (expressing reluctance to endorse racial classifications because they may promote notions of racial inferiority); *Wygant v. Jackson*, 476 U.S. 267, 276-78 (1986) (striking down collectively bargained remedial scheme governing school district layoffs); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315-19 (1978) (holding that, although university may consider race and ethnic background when reviewing individual candidates, quota system reserving set percentage of places for minority candidate was unconstitutional).

153. Compare *Plessy*, 163 U.S. at 551 (claiming that legislation cannot eradicate distinction between races) with *Croson*, 488 U.S. at 499 (disfavoring racial distinctions and precluding race conscious remedies designed to mitigate general societal discrimination).

154. See *Croson*, 488 U.S. at 529 (Marshall, J., dissenting) (stating majority decision marks significant set-back for affirmative action); see also *id.* at 500 (holding that official racial classification for affirmative action purposes is subject to strict judicial scrutiny and invalidation unless narrowly tailored to promote compelling government interests); *Fullilove v. Klutznick*, 448 U.S. 448, 480-84 (1980) (stating that Congress has latitude to implement innovative techniques including limited use of racial criteria to accomplish remedial objectives); *Bakke*, 438 U.S. at 307-09 (indicating that university admissions program that uses clear racial preferences violates equal protection, although program that considers race as affirmative factor would not).

155. See *Johnson v. Transportation Agency*, 480 U.S. 616, 676-77 (1987) (Scalia, J., dissenting) (criticizing employer's race and gender conscious promotion plan as compelling reverse discrimination in work-place); see also F. LYNCH, *INVISIBLE VICTIMS: WHITE MALES AND THE CRISIS OF AFFIRMATIVE ACTION* 182, app. 182-87 (1989) (providing accounts of white males who suffered reverse discrimination because of affirmative action programs).

156. See *Croson*, 488 U.S. at 493 (stating that remedial racial classifications may promote notions of racial inferiority); see also *Bakke*, 438 U.S. at 298 (criticizing racial preferences for reinforcing common stereotypes that certain minority groups cannot achieve success without aid of special programs); Wonnell, *Circumventing Racism: Confronting the Problem of the Affirmative Action Ideology*, 1989 B.Y.U. L. REV. 95, 120-21 (maintaining that affirmative action regards minorities as "passive objects" and "unqualified tokens").

157. See *Croson*, 488 U.S. at 493 (stating that affirmative action program denies equal opportunity to compete for fixed percentage of contracts based solely on race); see also *Bakke*, 438 U.S. at 298 (noting that preferential educational admissions programs may unfairly burden individual members of particular groups and increase racial tensions).

158. See *Croson*, 488 U.S. at 493 (stating that remedial racial classifications may lead to

examination, such reasoning appears to be more akin to a rationalization than a rationale.

1. *Unfair advantage*

The assumption that race-conscious remediation will create enduring and unearned advantages for minorities¹⁵⁹ reflects a thinking consonant with outcome-inspired reasoning.¹⁶⁰ Not surprisingly, the analysis sounds a false alarm while altogether missing the more trenchant risk that any preference for minorities is likely to be too transient.¹⁶¹ It is difficult to comprehend a meaningful system of remedial preference that could indefinitely withstand majoritarian self-interest.¹⁶² Evidencing that propensity is the dissipation of commitment to remedial preference when actual self-sacrifice becomes a real prospect.¹⁶³

Challenges to consent decrees requiring affirmative action plans reflect a similar tendency.¹⁶⁴ The ironic but true danger of any special remedial attention is not that minorities will benefit unfairly but that they will be denied opportunities for which they are qualified. Minority-conscious hiring may diversify the work-place only to a

politics of racial hostility); see also F. LYNCH, *supra* note 155, at 168-70 (asserting government support of race and gender preferences has fueled division between races and revived "tribal . . . hostilities").

159. See Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1332 (1986) (stating that Reagan Administration's policies "reflect[ed], reinforce[d], and capitalize[d] on widespread feeling that blacks have received an undeserving amount of the nation's attention"); Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 301 (1990) (noting popular belief that affirmative action programs advantage undeserving blacks); Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525, 542 (1990) (observing that dominant perception of affirmative action as corrupt system of favoritism "see-sawing between 'the deserving' and 'the preferred' caters to an assumption that those who are included by the grace of affirmative action are therefore undeserving").

160. The history of equal protection shows that appearances can be deceiving. In *Plessy*, the Court attempted to rationalize the separate but equal doctrine by emphasizing its racial symmetry. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896). It thus emphasized the unlikely consequence that if blacks became the dominant political force and insisted on racial segregation, whites would not interpret it as connoting their own inferiority. *Id.*

161. See *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 437 (1976) (stating that race-conscious remedies such as affirmative action are supposed to be temporary); Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 789 (1986) (distinguishing between corrective remedial approach that terminates affirmative action once effects of discrimination end, and distributive approach that anticipates ongoing intervention to maintain preferences). The temporary nature of any race-conscious remedies is well established in the areas of school desegregation, federal contracting, and employment. See *Board of Educ. of Oklahoma City v. Dowell*, 111 S. Ct. 630, 637 (1991) (stating that federal judicial supervision of school systems was not "intended to operate in perpetuity").

162. See *Wygant*, 476 U.S. at 272-73 (challenging collectively bargained lay-off plan that favored minority teachers when conditions transformed plan into actuality).

163. See *id.* (rejecting racially-referenced layoff of public employees).

164. See *Martin v. Wilks*, 490 U.S. 755, 758 (1989) (allowing white firefighters to challenge consent decrees setting forth remedial scheme for hiring and promoting black firefighters).

point at which advancement stops and employment decisions revert to traditional patterns.¹⁶⁵ The process may disfavor future minority candidates who, no matter how well qualified, are rejected because no "minority" positions are available.¹⁶⁶ In the corporate world, the problem may manifest itself in the form of a ceiling within the hierarchy beyond which minorities do not rise.¹⁶⁷ Such practices, whether described in terms of "tipping points" or "comfort zones," legitimately evoke genuine misgiving with respect to the philosophy and practice of race-conscious remediation.¹⁶⁸ A paradox of jurisprudence that avoids rather than confronts issues of race, therefore, is that it misses what may be especially compelling concerns about affirmative action.

2. Stereotypes and stigmatization

The argument that racial preference fosters outdated stereotypes and stigmatizes intended beneficiaries¹⁶⁹ might be more compelling if it accounted for the fact that race-conscious remediation may narrow rather than widen opportunities. Such concern with harmful consequences to affirmative action's intended beneficiaries, however, is transparent almost to the point of being insulting.¹⁷⁰

165. When decisions are made on race-dependent criteria and a certain number of minorities are included, the risk exists that aims are perceived as satisfied and subsequent minority candidates are not seriously considered. See D. BELL, *supra* note 66, at 43; Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 973-78 (1982) (noting courts have tolerated subjectivity in hiring procedures for upper level positions while demanding objective standards in lower level hiring practices); see also Jones, *Black Managers: The Dream Deferred*, HARV. BUS. REV., May-June 1986, at 85-86 (identifying frustrations of black managers who found that discrimination hindered their rise in corporate hierarchy).

166. Law school faculties that aggressively recruit minorities and, after hiring a token number, consider their task complete and successful illustrate this phenomenon. See D. BELL, *supra* note 66, at 143 (describing experience of qualified law school faculty candidate denied position because minority members already held sufficient number of positions). But see *Connecticut v. Teal*, 457 U.S. 440, 454-56 (1982) (holding that "bottom line" racial balance does not provide defense against employment discrimination claim).

167. See Jones, *supra* note 165, at 86 (describing experience of blacks in finding that "corporate door is open, but access to the upper floor is blocked").

168. The concept of "tipping points" emerged in the context of school desegregation. To maintain integration, school districts implemented plans that cut-off black enrollments in some schools at a certain level, or tipping point, due to concern that whites otherwise would leave. See *Parents Ass'n of Andrew Jackson High School v. Ambach*, 738 F.2d 574, 576-77 (2d Cir. 1984); *Riddick v. Board of Norfolk*, 784 F.2d 521, 543 (4th Cir.) (describing efforts to stem acceleration in some schools toward exclusive minority population), *cert. denied*, 479 U.S. 938 (1986). Consequently, black students could be denied admission to a particular school even though it would accept white students.

169. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (noting that requiring set ratio of black teachers would contradict *Brown*); see also *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting) (arguing that affirmative action assumes "that those who are granted special preferences are less qualified in some respect that is purely identified by race" and that such assumption actually increases racial prejudice).

170. The notion that affirmatively created opportunity is injurious seems particularly absurd in contrast with the harm attributable when opportunity is otherwise denied. See Brooks,

Remediation is necessary to compensate for blocked opportunity, not for lack of qualifications.¹⁷¹ Failure to recognize the distinction, and any resulting stigmatization, reflects the vitality of attitudes necessitating a remedial response. When insisting on the dismantling of dual school systems, the Court expressed resolve that it would not retreat from principle despite animosity toward its methodology of accounting.¹⁷² What now is articulated as concern for intended beneficiaries of affirmative action, however, intimates continuing accommodation of attitudes and conventions that historically have denied or cramped opportunity to minorities.¹⁷³

Concern that affirmative action harms innocent victims represents

Affirmative Action in Law Teaching, 14 COLUM. HUM. RTS. L. REV. 15, 47 (1982) (arguing that abandonment of affirmative action would not necessarily defeat "less-than-qualified stigma"); Finell, *Affirmative Action and the Law Review*, N.Y.L.J., Aug. 5, 1981, at 2, col. 3 (letter) (asserting that skills minorities learn compensate for any stigmatizing effects of affirmative action); Williams, *supra* note 159, at 542 (asserting that society's assumption of black inferiority has "life that precedes and will probably outlive affirmative action programs" and concluding stigma of inferiority is not generated by affirmative action but rather "is manufactured in the hearts and minds of individuals" and is within American tradition of seeing persons of color as "inferior beings"); *Blacks and the Reviews*, 12 BLACK ENTERPRISE 26 (1982) (quoting Lorenzo Little, President of Black Law Students Association at Harvard Law School) (stating stigmatization concerns immaterial when beneficiaries of preferential law review scheme confront prejudiced employer who perceives them negatively in either event).

171. See *Local 28 of Sheet Metal Workers Int'l Assoc. v. EEOC*, 478 U.S. 421, 464 (1986) (stating that affirmative action remedies are sometimes necessary to eliminate consequences of past discrimination). Given a society functionally disposed if no longer officially obligated toward race-dependent judgment, initiatives that account for race are essentially reactive.

172. See *United States v. Scotland Neck Bd. of Educ.*, 407 U.S. 484, 491 (1972) (invalidating state statute creating separate school district because it failed to accomplish "complete uprooting of the dual public school system").

173. Accumulated advantage from past wrong is never really addressed, much less accounted for, insofar as it is constitutionally impermissible to repair a legacy of societal discrimination. See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 498-508 (1989) (supporting position that general history of societal discrimination is insufficient justification for race-conscious classification in context of remedial programs). But see *Fullilove v. Klutznick*, 448 U.S. 448, 465 (1980) (allowing findings of past societal discrimination to justify set asides pursuant to congressional finding and authorization).

Jurisprudence expressing concern with stigmatization does so only on a selective basis. For instance, preferences based on seniority at the expense of merit are routine. In *Wygant v. Jackson Board of Education*, 476 U.S. 267, 282-83 (1986), the Court invalidated a race-conscious lay-off provision, because it interfered with such expectations. Favoritism for seniority thus comported with traditional ordering of priorities and deferred to "established usages, customs and traditions." *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896).

If stigmatization were a genuinely pressing concern, the case for race-conscious remediation would actually be strengthened. White males especially would be subject to negative stereotyping because many achieved their status absent competition from minorities and women. Race-conscious remedies thus would seem to possess the capacity to eliminate more stigma than they cause insofar as white males might no longer be stigmatized by perceptions that they would not succeed on their own merits.

The Court nonetheless has chosen to focus on stigmatization of minorities. See *Regents of the Univ. of Ca. v. Bakke*, 438 U.S. 265, 298 (1978) (maintaining that affirmative action stigmatizes minorities by implying they could not have succeeded on their own). Stigmatization and stereotyping, realities predating remedial initiatives, consequently function as selective reference points to defeat principles that might effectively respond to them.

the most candid acknowledgement of majoritarian self-interest.¹⁷⁴ What is not confessed, however, is that advantage acquired as a consequence of racial discrimination and inequality is passed on to subsequent generations.¹⁷⁵ Insofar as remediation is precluded, disparities at best persist and at worst compound.¹⁷⁶ Jurisprudential resistance to concepts that would tamper with the legacy of accumulated advantage is an extension and accommodation of majoritarian interests. As such, it demonstrates how constant the ordering of constitutional priorities has remained over time.¹⁷⁷

3. *Tribal politics*

Because racial politics have been responsible for racial injustice since the republic's founding, reference to them as an excuse for precluding race-conscious remediation¹⁷⁸ is at least selective if not outright discriminatory. Blaming affirmative action for tribal politics, however, not only is akin to charging a victim with responsibility for a crime but disregards the nature of a political process that already is fractured in racial and other special interest terms. Racial politics originated with a conscious decision two centuries ago allowing states to diminish the status of blacks.¹⁷⁹ Since then, tribal politics have been fueled by schemes that denied and diluted minority influence even after the right to vote was extended¹⁸⁰ and by racial maneuverings that even now are the subject of special legislative attention.¹⁸¹ Exclusion of race as a permissible reference point for the political process dismisses the pernicious consequences of ra-

174. See *Wygant*, 476 U.S. at 276 (stating that race-conscious legal remedies injure innocent people and societal discrimination is insufficient to justify them).

175. See *Croson*, 488 U.S. at 561 (Blackmun, J., dissenting) (explaining that innocent individuals disfavored by affirmative action have benefitted from "wrongs of past decades").

176. See *Board of Educ. of Oklahoma City v. Dowell*, 111 S. Ct. 630, 638 (1991) (noting district court's finding of racial segregation within school system after it had ceased supervision).

177. See *Croson*, 488 U.S. at 498-508 (supporting position that general history of societal discrimination is insufficient justification for race-conscious classifications). As observed *supra* at notes 5-6, the jurisprudence of race over two centuries is notable for its consistent subordination of minority interests.

178. See *id.* at 493 (stating that remedial classifications based on race can lead to politics of racial hostility).

179. See *supra* notes 5-6 and accompanying text (discussing racial politics central to formation and ratification of Constitution).

180. Despite passage of the fifteenth amendment prohibiting discrimination in voting rights, the franchise was not meaningfully secured until Congress enacted the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1971 (1988)). The Voting Rights Act essentially prohibits the myriad of devices, such as literacy tests and poll taxes, that had denied voting rights to blacks for nearly a century after the fifteenth amendment's adoption. *Id.*

181. See Civil Rights Act of 1990, S. 2104, 101st Cong., 2d Sess. (1990); President's Veto Message on S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. 16,457-58 (daily ed. Oct. 22, 1990).

cism and disregards the nature of a system supposedly responsive to interest groups of all races, colors, or creeds.¹⁸² By materially confounding race-conscious remedial measures, the Court has impaired the ability of minority groups to manipulate the political process by forming coalitions and responding to the consequences of discrimination.¹⁸³ The results of jurisprudential denial and evasion are that the underlying causes of racial injustice escape serious constitutional attention and the ultimate responsibility for racial division is masked.¹⁸⁴

F. Motive-Based Inquiry: Denial of Proof

Modern equal protection, as glossed by discriminatory purpose and color-blind criteria, primarily has become a constitutional force for defeating remedial initiatives.¹⁸⁵ The fourteenth amendment's original concern with minority interests now manifests itself in rare instances of comparatively diminished significance, as when the guarantee is adverted to in removing an occasional remnant of the separate but equal era.¹⁸⁶ In pursuing motive-based inquiry for equal protection purposes, the Court suggested some reference points for discerning wrongful purpose which in operation have proved unproductive and further illustrated the futility of the inquiry.¹⁸⁷ It has noted that general history and specific events, par-

182. Special interest politics, even if frequently criticized, are a defining feature of modern governance. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 584 (1985) (O'Connor, J., dissenting) (stating that recent changes, such as direct election of senators and expanded influence of national interest groups, have enhanced special interest politics).

183. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 270-72 (1986) (describing collective bargaining agreement concerning layoff policy that responded to recognized racial tensions in school district). By declaring the program unconstitutional, the Court subverted not only the remedial aim but also the racially-mixed coalition that negotiated and agreed to it.

184. See generally Note, *The Nonperpetuation of Discrimination in Public Contracting: A Justification for State and Local Minority Business Set-Asides After Wygant*, 101 HARV. L. REV. 1797, 1799-1801 (1988) (stating that strict application of *Wygant* decision to minority business enterprise (MBE) set-asides would result in defeat of almost any such program because the three-prong test is so rigidly defined).

185. See *supra* notes 127-40 and accompanying text (discussing difficulty in proving discriminatory purpose). Because wrongful purpose is difficult to prove except with respect to remedial schemes that are overtly race-conscious, affirmative action is uniquely susceptible to invalidation. See Sullivan, *Sin of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 91-99 (1986) (noting that Court has only approved affirmative action to repent for specific sins of past racism); Walther, *Affirmative Action and the Remedial Scope of Title VII: Answers to Substantive Questions*, 136 U. PA. L. REV. 625, 646-54 (1988) (analyzing different methods of distributing burden of proof to accomplish more equitably remedial goals of discrimination claims).

186. See *Hunter v. Underwood*, 471 U.S. 222 (1985) (invalidating state law, classifying the passing of bad checks as crime "involving moral turpitude" to keep offenders off voter registration rolls, as reflecting invidious motive). The significance of the decision is undercut, and the utility of motive-based inquiry jeopardized, by the possibility that the same law could be enacted for a racially neutral purpose. *Id.* at 233.

187. See *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267-68

ticularly substantive or procedural departures from official norms, may be useful in identifying invidious motive.¹⁸⁸ Given the infrequency with which discrimination against minorities is now discerned, such guidance has proved largely meaningless.¹⁸⁹

Worse still, historical inquiry actually may be used to facilitate denial and evasion. For instance, in *McCleskey v. Kemp*,¹⁹⁰ the Supreme Court found no constitutional infirmity despite gross racial disparities in prosecutorial pursuit of capital punishment and ensuing adjudicated results.¹⁹¹ Critical to the outcome was disregard for or discounting of statistical significance¹⁹² and a dual system of criminal justice that long had operated in the state.¹⁹³ Exercises in historical inquiry thus have proved selective, at least with respect to discerning constitutionally significant practices.

The projected impression that historical inquiry is relevant, more-

(1977) (explaining that sudden changes in zoning, departure from standard procedures, and legislative history may be useful when determining intent). Departure from normal procedural sequences might afford evidence that improper purpose was present. *Id.* at 267. Substantive departures may also have significance in discerning wrongful motive. *Id.* It may be especially relevant if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached. *Id.*; see also *Daily v. City of Lawton*, 425 F.2d 1037, 1040 (10th Cir. 1970) (holding that record supported finding that actions of planning commission and city council in denying building permit and zoning change to construct low-income housing project in area zoned high density residential were racially motivated, arbitrary, and unreasonable). The Court has noted that only in rare instances may a "clear pattern," unexplained on grounds other than race, exist. *Id.* at 266.

188. *Arlington Heights*, 429 U.S. at 266. Although it identified historical background as a nonexclusive consideration, the Court has not identified other pertinent reference points. However, in previous decisions the Court has looked at the "heterogeneity" of the nation's population when determining racial discrimination. *Jefferson v. Hackney*, 406 U.S. 535, 547-48 (1972).

189. Besides *Hunter*, the only other notable equal protection triumphs for racial minorities in the 1980s were *Batson v. Kentucky*, 476 U.S. 79, 86 (1986), in which the Court stated that a prosecutor's use of peremptory challenges to eliminate black jurors denied equal protection, and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), in which the Court invalidated a law approved by voters and transferring power to order busing from school boards to state legislature.

190. 481 U.S. 279 (1987).

191. An equal protection claim was based on a study showing that prosecutors in Georgia "sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims." *McCleskey v. Kemp*, 481 U.S. 279, 287 (1987). The death penalty actually was assessed "in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims." *Id.* at 286.

192. *Id.* at 312 (characterizing "[a]pparent discrepancies in sentencing [as] an inevitable part of our criminal justice system").

193. *Id.* at 325 (Brennan, J., dissenting) (discussing results of Baldus study). The Baldus study distinguishes between (1) cases in which the jury exercises virtually no discretion because the strengths or weaknesses of existing factors usually suggest the expected outcome, and (2) cases reflecting an "intermediate" level of aggravation, in which the jury has considerable discretion in choosing sentencing. In intermediate range cases, death is imposed in 34% of white-victim crimes and in 14% of black-victim crimes, a difference of 139% in the rate of imposition of the death penalty. *Id.*

over, is betrayed by its actual application in critical settings.¹⁹⁴ Residential segregation in major population centers is a phenomenon of the post-*Brown* era that, apart from any motive, results from enhanced personal mobility and suburban development.¹⁹⁵ Soon after the Court issued the desegregation mandate, a confluence of race-dependent and race-neutral factors contributed to the emergence of new communities and school districts with no history whatsoever, much less a record of intentional discrimination.¹⁹⁶ In the context of modern residential segregation, historical inquiry, instead of facilitating identification of illegal motive, has been used in a way that essentially negates its relevance. Concerns that the present order of racial separation is as pernicious as the old accordingly are dismissed on grounds that it merely reflects "normal patterns of human migration."¹⁹⁷ Or, to borrow from *Plessy*, it is merely another consequence "in the nature of things."¹⁹⁸

Even if historical inquiry is of little practical value for purposes of modern equal protection analysis, it discloses significant patterns and trends when applied to Supreme Court jurisprudence.¹⁹⁹ Validation of slavery was couched in terms of racial supremacy.²⁰⁰ Prior to 1954, the Court regularly deferred to and even invested in concepts of racial inequality.²⁰¹ Even when contesting the separate but

194. Equal standing before the legal system, for instance, was a central original concern of the fourteenth amendment. See CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (stating objective of proposed amendment was to provide equal civil liberties to all citizens).

195. The phenomenon of white flight, coinciding with the prospect of school desegregation, was made possible by the creation of new suburban communities and transportation facilities that made massive relocation feasible. See generally Price, *Causation of Public Applicant Choice in Tenant Selection and Assignment Plans*, 10 B.C. THIRD WORLD L.J. 121 (1990) (discussing causes and effects of white flight).

196. Although demanding proof of discriminatory purpose when a zoning ordinance excluding low income housing was challenged, the Court acknowledged the community's limited and thus unrevealing history. *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 242, 255 (1977). As with any other equal protection claim, discernment of a constitutional violation is contingent on proof of a wrongful motive that is elusive, disguised, or even unconsciously held. See *supra* notes 133-40 and accompanying text (examining futility of motive-based inquiry).

197. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436 (1976).

198. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

199. Unlike the fourteenth amendment, the Court's record on race dates back to the early part of the nineteenth century when it authored opinions that supported slavery. See, e.g., *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (upholding slavery pursuant to perception of original constitutional intent); S. LYND, *SLAVERY AND THE FOUNDING FATHERS IN BLACK HISTORY*, 119 (M. Dimmer ed. 1968) (concluding that contradiction between recognition of individual rights demanded by white Americans for themselves and suppression of those rights for blacks are best explained by almost universal belief in black inferiority); see also *supra* note 54 and accompanying text (discussing Court's classification of blacks as property).

200. See *Scott*, 60 U.S. (19 How.) at 407 (purporting that framers of Constitution viewed blacks as inferior and properly subjected to bondage).

201. See *supra* note 78 and accompanying text (noting Court's past acceptance of segregated public venues).

equal doctrine, Justice Harlan felt obligated to express his personal sense of white superiority.²⁰² Such notions overtly permeated equal protection review until separate was declared inherently unequal.²⁰³

Although *Brown* represented a break with the past, it did not amount to a complete rupture.²⁰⁴ The desegregation mandate was cautiously introduced and even delayed in deference to the dominant culture's sensitivities.²⁰⁵ It eventually was gutted prior to realization of its full potential for eliminating unequal educational opportunity.²⁰⁶ As a consequence, supplanting both equal education and separate but equal education is schooling that is separate and unequal.²⁰⁷ While now refusing to invoke equal protection assertively to confront modern variants of discrimination against minorities, the Court interposes it to defeat affirmative action schemes.²⁰⁸

In steering racial jurisprudence toward results coinciding with majoritarian interests, the Supreme Court has deviated from procedural and substantive norms.²⁰⁹ Although questioning a trial court's evidentiary findings is unusual in the course of appellate re-

202. See *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting) (predicting that, if white race subscribed to principles of Constitutional fair play, it was and would continue to be "dominant . . . for all time").

203. See *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (invalidating separate but equal doctrine).

204. On its face, modern insistence on color-blind standards may appear the doctrinal opposite of their rejection a century ago. Given altered circumstances, however, more similarity than difference exists. Rejection of color-blindness in 1896 was key to the validation of official segregation. See *Plessy*, 163 U.S. at 551 (explaining that forced separation does not imply inequality). Color-blindness is now used to defeat affirmative action plans. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (describing problems associated with race-conscious remedial measures).

205. See A. T. MASON, *supra* note 102, at 190 (describing public reaction to Court's desegregation decision and consideration of social climate in departing from precedent). Delay in implementing the decree reflected the Court's concern with the impact on the dominant culture and its effort to elicit cooperation rather than resistance. See *supra* notes 102-11 and accompanying text (describing delay and public reaction to desegregation mandate).

206. See *supra* notes 59-60, 102-11 and accompanying text (discussing Court's hesitation when enforcing desegregation and actual impact of racial inequality).

207. See *Milliken v. Bradley*, 418 U.S. 717, 782 (1974) (Marshall, J., dissenting) (observing that narrowing of desegregation mandate ensures that "[n]egro children . . . will receive the same separate and inherently unequal education in the future as they have been unconstitutionally afforded in the past").

208. Successful equal protection challenges in the 1980s consisted increasingly of defeating or destabilizing affirmative action plans. See *Martin v. Wilks*, 490 U.S. 755 (1989) (allowing white firefighters to challenge Title VII remedial measures concerning promotions); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (defeating affirmative action plan governing construction bids); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (striking down remedial layoff procedures that favored minority teachers).

209. Even the desegregation mandate provided relief in a careful and belated fashion. See *supra* notes 101-09 and accompanying text (recognizing desegregation mandate as significant but temporary factor in equal protection history). Because relief was not promptly forthcoming for students, whose education proceeded unchanged, remediation in effect was denied.

view, it was a means by which the Court negated the concept of a metropolitan school desegregation plan.²¹⁰ Recently, the Court has compounded the burden of proving employment discrimination,²¹¹ narrowed civil rights legislation previously construed as prohibiting racial harassment in the work-place,²¹² and exhumed consent decrees implementing affirmative action plans from the graveyard of final judgment.²¹³

Investment in motive-based inquiry persists for equal protection purposes despite the Court's repudiation of it in the first amendment context,²¹⁴ and Chief Justice Rehnquist's²¹⁵ and Justice Scalia's²¹⁶ criticism of it in other constitutional settings. The selective retention of motive-based criteria suggests that, although the constitutional stakes are too high to countenance its operation when other fundamental interests are implicated, the opposite is true when equal protection concerns are present. The implicit regard for or deprecation of equal protection interests suggests a racial classification possessing suspect styling of the most traditional order.²¹⁷ Recently, the Court observed that "[n]either our words nor our decisions should be interpreted as signaling one inch of retreat from . . . forbidding discrimination in the private as well as the pub-

210. See *Milliken*, 418 U.S. at 747 (stating that trial court transcended original theory of case by mandating metropolitan desegregation plan with no evidence of interdistrict violation).

211. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651 (1989) (requiring plaintiff to identify specific business practice causing claimed discrimination); see also *id.* at 672 (Stevens, J., dissenting) (criticizing Court for its "troubling" redefinition of employee's burden of proof in disparate impact cases).

212. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (holding on-the-job harassment is not covered by federal law prohibiting discrimination in formation of contracts because conduct occurred after contractual relationship established).

213. See *Martin v. Wilks*, 490 U.S. 755, 769 (1989) (holding that white firefighters not parties to preceding affirmative action consent decrees may challenge them).

214. See *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) (refusing to engage in search for illicit legislative motive because such inquiry is treacherous and futile).

215. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 702-03 (1981) (Rehnquist, J., dissenting) (criticizing focus on legislative intent when assessing whether state restrictions on truck size discriminated against other states' interests and wrongly burdened interstate commerce).

216. *Edwards v. Aguillard*, 482 U.S. 578, 610 (1987) (Scalia, J., dissenting) (explaining inadequacy of motive-based inquiry in establishment clause context).

217. Prior to affirmative action becoming a dominant issue, equal protection had focused on classifications adversely affecting discrete and insular minorities. Such groups included those who were traditionally disadvantaged and excluded from or under-represented in the political process. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (recognizing that statutes directed at certain minorities may require more searching judicial scrutiny). Disabling minorities from effectuating coalitions to advance their interests in a race-conscious society creates precisely the type of process defect that originally justified heightened judicial scrutiny. See *id.* (acknowledging that such prejudices may curtail political processes ordinarily relied on to protect minorities).

lic sector.”²¹⁸ Considering the persistent record of manipulating criteria to service majoritarian interests, a more accurate observation may be that neither its “words nor . . . decisions” should be interpreted as signaling one inch of retreat from a legacy of denial and evasion.

III. ACCOUNTING FOR UNFINISHED CONSTITUTIONAL BUSINESS

The Supreme Court has had many opportunities throughout its history to vitalize the Constitution in a way that responds to and accounts for legitimate minority grievances. Instead, the Court has invalidated laws attempting to interfere with slavery,²¹⁹ upheld slavery,²²⁰ limited Congressional power to reach racial violence and intimidation,²²¹ and formulated the separate but equal doctrine.²²² Even after declaring official segregation and discrimination unconstitutional,²²³ the Court fashioned criteria that confounded equal protection claims by minorities²²⁴ and blunted initiatives to account for racial injustice.²²⁵

Contemporary equal protection jurisprudence acknowledges that “there is no doubt [about] the sorry history of both public and private discrimination in this country.”²²⁶ Even Justice Scalia, who has expressed the stiffest resistance to any form of race-conscious remediation,²²⁷ has conceded that “[i]t is plainly true that in our

218. *Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989) (noting societal consensus that color-based discrimination is “a profound wrong of tragic dimension”).

219. *See, e.g., Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 536, 625-26 (1842) (invalidating state law punishing kidnappers of fugitive slaves); *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 499 (1841) (finding that special legislative action necessary in order to effectuate law prohibiting importation of slaves); *Queen v. Hepburn*, 11 U.S. (7 Cranch) 290, 293 (1813) (holding hearsay evidence inadmissible to prove plaintiff’s emancipation).

220. *See Scott v. Sandford*, 60 U.S. (19 How.) 393, 406 (1856) (finding that blacks are not citizens of United States within Constitution and thus not entitled to rights and immunities guaranteed by Constitution).

221. *See United States v. Cruikshank*, 92 U.S. 542, 556-59 (1875) (ruling that indictment for racial threats and intimidation did not fall within federal law qualified by state action requirement).

222. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (holding that equality before law is all that is required by Constitution and legislation is powerless to eradicate distinction based on social distinctions).

223. *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (invalidating separate but equal doctrine and announcing desegregation mandate).

224. *See supra* notes 112-50 and accompanying text (arguing that key obstacle is judicially formulated requirement of discriminatory purpose).

225. *See supra* notes 151-58 and accompanying text (criticizing modern review for holding race-conscious remediation hostage to newly emphasized standards of color-blindness).

226. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 499-500 (1989); *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 278 n.5 (1986) (plurality opinion) (stating “[n]o one disputes that there has been race discrimination in this country”).

227. *See Croson*, 488 U.S. at 527-28 (Scalia, J., concurring) (arguing that only race-neutral programs are in accord with Constitution).

society blacks have suffered discrimination immeasurably greater than any directed at other racial groups.”²²⁸ Notwithstanding recognition of a past and abiding problem, the Court still seems inclined to frustrate methodologies of accounting that are broadly but directly responsive.²²⁹ Recognition of past constitutional wrongs has not induced the Court to depart from its course of denial and evasion of compounded realities, and the judiciary thus remains resistant to constitutional quickening.

Jurisprudential unresponsiveness to minority claims is best explained as a failure of will rather than a failure of ways. Standards that are unfriendly to discrimination claims except when remediation is at issue are not textually ordained but are glosses resulting from jurisprudential reasoning. Throughout history, the Court has championed majority interests.²³⁰ As noted previously, the legacy endures in the form of motive-based inquiry and hostility to race-conscious remediation.

Equal protection's record of underachievement might be more acceptable if no clear or appropriate reference existed for performance. Credible sources, including the fourteenth amendment's original intent and modern criteria for grafting fundamental rights, are available for actuation purposes.²³¹ The Court mostly has bypassed those doctrinal possibilities, however, despite the fact that the amendment itself is free of the complications that ordinarily

228. *Id.*

229. See, e.g., *Croson*, 488 U.S. at 507-11 (invalidating remedial scheme in construction set-aside context); *Wygant*, 476 U.S. at 283-84 (overturning Board of Education's plan for insulating minorities against layoffs); *Milliken v. Bradley*, 418 U.S. 717, 745-47 (1974) (finding that district court went beyond its authority when ordering inter-district desegregation plan); *Bell, Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 527 (1980) (noting that Court has increasingly erected barriers to achieving racial balance).

230. See Comment, *Rethinking Equal Protection Doctrine in the Wake of McCleskey v. Kemp*, 11 NAT'L BLACK L.J. 348, 350 (1990) (arguing that modern formulation of equal protection standards placates majority by conveying idea that racism is aberration rather than cultural condition). In *McCleskey*, the Court considered whether racial disparities in death sentences violated equal protection. The Court found no constitutional deficiency and expressed concern that a contrary decision would invite countless claims by minorities based on disproportionate impact. *McCleskey v. Kemp*, 481 U.S. 279, 315 (1987).

231. See generally Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 YALE L.J. 74 (1963-64) (conveying overview of controversy between complete and selective incorporation). Some Supreme Court justices have advanced the view that the fourteenth amendment incorporates the Bill of Rights in its totality. See *Griswold v. Connecticut*, 381 U.S. 479, 526 n.21 (1965) (Black, J., dissenting) (expressing view that Bill of Rights should be transported intact into fourteenth amendment); *Poe v. Ullman*, 367 U.S. 497, 515 (1961) (Douglas, J., dissenting) (stating that fourteenth amendment due process incorporates first eight amendments). A majority of the Court, however, has rejected total incorporation and has instead held that the fourteenth amendment incorporates only specific provisions of the Bill of Rights. See *Malloy v. Hogan*, 378 U.S. 1, 4 (1964) (noting that prevailing view has favored selective rather than complete incorporation).

render motive-based inquiry a futile exercise.²³²

The fourteenth amendment's central aim, acknowledged by its framers, was to effectuate equal opportunity for material self-development and legal parity.²³³ Even as a charter of limited equality,²³⁴ the fourteenth amendment demands attention to rather than retreat from claims of racial discrimination. Courts cannot ignore assertions of inequality of economic opportunity, whether in the context of employment,²³⁵ contracting,²³⁶ education,²³⁷ or housing²³⁸ without disrespecting the original fourteenth amendment objectives. A judiciary dedicated to principles of restraint is doubly obligated to discern and to account for the provision's central and still unfulfilled charge.

A. Fortifying Pertinent Standards

Because motive-based inquiry facilitates evasion of constitutional claims, the Court should fortify standards of review so that effective disparities alone justify closer judicial inspection.²³⁹ Enhanced attention to interests originally countenanced by the framers would represent significant albeit belated progress in effectuating their limited agenda. It would do so, moreover, without launching the parade of horrors adverted to by the Court when resisting effects-oriented analysis.²⁴⁰ To advance original purpose, review of poli-

232. See *supra* notes 214-16 (observing that Court has abandoned motive based inquiry in several contexts due to difficulty of interpreting legislative intent and pertinence of effects analysis).

233. See CONG. GLOBE, 39th Cong., 1st Sess. 474-75 (1866) (statement of Sen. Trumbull) (discussing goal of fourteenth amendment). Even if legislative purpose normally is difficult to discern in other settings, the fourteenth amendment's core purpose is readily identifiable. Its limited aim, to secure equality of contract and property rights and standing before the law, was consensually acknowledged.

234. The fourteenth amendment's architects emphasized that the provision was not intended to effectuate comprehensive equality. See CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson).

235. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283-84 (1986) (plurality opinion) (invalidating plan to insulate minorities from layoffs).

236. See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 507-11 (1989) (invalidating remedial set-aside for minority contracting firms).

237. See *supra* notes 59-60, 102-11 and accompanying text (discussing Court's hesitation in effectuating desegregation and eventual construction of principles limiting mandate's reach).

238. See *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 254 (1977) (reversing appeals court determination that refusal to rezone was racially discriminatory).

239. See Perry, *A Brief Comment on Motivation and Impact*, 15 SAN DIEGO L. REV. 1173, 1178 (1978) (arguing that any law having disproportionate impact should be subject to unusually heavy burden of justification); Comment, *supra* note 230, at 358 (proposing "impact plus" standard to buttress showing of disparate impact). See generally Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297 (1987) (arguing that disparate impact theory responds to weakness of intent based theory).

240. See *Washington v. Davis*, 426 U.S. 229, 248 (1976) (concluding that focus on effect or disparity alone would jeopardize "whole range of tax, welfare, public service, regulatory and licensing statutes").

cies calculated to promote equal economic opportunity should be relaxed to the point that initiatives seeking to account for society's legacy of discrimination are permissible. Consequent scrutiny would not be entirely deferential, to ensure that programs are not actually harmful or gratuitous,²⁴¹ but at least would accommodate initiatives designed to "get beyond racism [by] first tak[ing] account of race."²⁴²

B. Alternative Sources of Inspiration: Economic Opportunity and Unfair Advantage

Even without considering original intent, it is possible to identify appropriate standards that facilitate a more forthright accounting of minority claims and interests. Criteria determining whether a fundamental liberty should be jurisprudentially fastened to the fourteenth amendment, have proven more prolific as a source of assertive constitutional law for general purposes than of principles pertaining to the provision's central concern with race.²⁴³ When considering whether to gloss a fundamental right on the fourteenth amendment, the Court typically probes for what is "deeply rooted in the Nation's history and tradition."²⁴⁴ An honest inquiry of that nature invariably would discern the centrality of economic opportunity.²⁴⁵ Such opportunity is so deeply embedded in society's ways and expectations that, when the economic system is dysfunctional in affording it, official remediation is the rule rather than the

241. For instance, a preferential scheme formulated in a venue where a national minority was politically dominant might merit closer attention. See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 551-55 (1989) (Marshall, J., dissenting) (conceding that in areas where minorities are politically dominant, numerical and political supremacy is factor bearing on level of scrutiny to be applied). Even then, however, review should not presume that policymakers were operating without valid perceptions or cause. See *id.* at 543-44 (Marshall, J., dissenting) (arguing that local officials are extremely well qualified to make determinations of public good).

242. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (Blackmun, J., dissenting) (contending that arrangement of successful affirmative action programs by race neutral means is impossible).

243. While the desegregation mandate was devolving during the 1970s, the jurisprudentially glossed right of privacy was expanding to account for liberty interests in several settings. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 390-91 (1978) (invalidating statute prohibiting certain persons from marrying without first obtaining court's permission as unconstitutional interference with fundamental right of marriage); *Moore v. City of E. Cleveland*, 431 U.S. 494, 500 (1977) (plurality opinion) (striking down ordinance permitting only certain categories of related individuals to live together in single family dwelling on grounds it compromises fundamental right of family); *Roe v. Wade*, 410 U.S. 115, 153 (1973) (extending right of privacy to include woman's qualified liberty to terminate pregnancy).

244. *Moore*, 431 U.S. at 503 (plurality opinion) (noting constitutional protection of family institution grounded in societal tradition).

245. See *supra* note 21 and accompanying text (discussing Court's consistent use of fourteenth amendment as means of facilitating principles of economic liberty).

exception.²⁴⁶

Reflecting the profundity of the interest, intervention to undo excessive accumulation of power and advantage and open up or maximize opportunity is a regulatory norm in other contexts. Enactment of antitrust laws, for instance, reflected the sense that:

[T]he present system of production and of exchange is having that tendency which is sure at some not very distant day to crush out all small men, all small capitalists, all small enterprises. This is being done now. We find everywhere over our land the wrecks of small, independent enterprises thrown in our pathway. So now the American Congress and the American people are brought face to face with this sad, this great problem. Is production, is trade, to be taken away from the great mass of the people and concentrated in the hands of a few men who . . . have been enabled to aggregate to themselves large, enormous fortunes?²⁴⁷

Even without constitutional direction akin to the equal protection decree, Congress and the judiciary directly have confronted "the evils [which] . . . grow out of the present tendency of economic affairs . . . [and] hav[e] that tendency . . . to crush out all small . . . enterprises."²⁴⁸

The Court, in contrast, largely has avoided accounting for racially-based accumulation of advantage and distribution of opportunity.²⁴⁹ Such evasion persists despite a discernible constitutional intent as a more obvious point of remedial inspiration. Insofar as redistribution of opportunity is commonplace when required by fair competition, it is difficult to take seriously the contention that affirmative action is unacceptably disruptive and harmful.²⁵⁰ The argument also is flawed to the extent that antitrust remedies have impact far more profound than the relatively limited consequences of affirmative action.²⁵¹ Exclusion of race-conscious remediation

246. See *Northern Pac. R. R. v. United States*, 356 U.S. 1, 4 (1958) (stating that antitrust laws designed as comprehensive charter of economic liberty to optimize allocation of economic resources).

247. 21 CONG. REC. 2598 (1890) (statement of Sen. George) (arguing that antitrust laws are necessary to promote equality of wealth and prevent aggregation of wealth in minority hands).

248. *Id.*; see Sherman Act, 15 U.S.C. §§ 1-2 (1890) (outlawing trusts, combinations, conspiracies, monopolization, attempted monopolization in restraint of trade).

249. See Comment, *supra* note 230, at 360 (arguing that far reaching implications of Supreme Court's discrimination decisions relegate racial minorities to second class citizenship); *supra* note 230 (noting how standards set by Supreme Court primarily have served majoritarian interests).

250. See *supra* notes 169-77 and accompanying text (criticizing argument that affirmative action programs stigmatize minorities).

251. Contrary to the Court's belief that it is dangerously potent, affirmative action is subject to criticism that it focuses too narrowly on a relatively elite and qualified subgroup and diverts attention from broader remedial needs. See W. WILSON, *THE DECLINING SIGNIFICANCE*

from otherwise permissible options for systematic recontouring represents, in essence, a real but largely unacknowledged racial classification.

C. *Constitutional Imperative and Democratic Consonance*

Original intent and contemporary methodology for vitalizing the fourteenth amendment may provide credible and even compelling reasons for animating equal protection in terms responsive to minority claims and interests. The actual possibility that the Supreme Court will finally reckon with society's legacy of discrimination, however, appears dim. Prospects are especially bleak after the retirement of one of the Court's most forceful exponents of accounting for racial injustice.²⁵² A more likely prospect is a standard of review

OF RACE 110 (1978) (arguing that major impact of affirmative action has been in higher-paying jobs, as programs not pitched toward disproportionate concentration of blacks in low-wage labor market).

The AT&T break-up discloses a willingness to restructure the nation's central communications system out of concern with accumulated advantage, dominance, and undue influence. *See United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983) (approving consent decree ordering divestiture by telecommunications corporation of local operating companies). Relief was neither foreclosed nor delayed by concern that special relief or attention would stigmatize or stereotype AT&T's competitors. On the contrary, their contentions were regarded as legitimate claims for an opportunity to compete on a level playing field. *See id.* at 149 (noting that "the need to safeguard free competition is a direct result of the fundamental promise of our economic system"). Nor were consequent restrictions on the dominant company regarded as impositions on an innocent victim. Rather, the district court emphasized that it may be necessary to "pry open to competition, a market that has been closed" by illegal action. *Id.* at 150 (quoting *International Salt Co. v. United States*, 332 U.S. 392, 401 (1947)). The restrictions were not viewed as harming an innocent victim despite an available argument that AT&T acquired its preeminent position in a perfectly legal fashion. *See P. AREEDA & L. KAPLOW, ANTITRUST ANALYSIS* 527 (1988) (referring to AT&T local companies as "lawful monopolies").

A similar claim concerning the victimization of innocent parties was raised in a comparable context, when the Federal Communications Commission (FCC) ordered newspaper publishers owning co-located television stations to divest. *See FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 787 (1978) (ordering divestiture in cases of common ownership of sole daily newspaper and sole radio or television station in community). Many publishers had acquired and invested in broadcast properties pursuant to prior FCC policies encouraging such co-ownership. *See id.* at 782-83 (noting that previous FCC policy aims of ensuring best service to public and avoiding undue disruption of service led to newspaper owners acquiring broadcast stations in same communities). Notwithstanding prior policies and their reliance on them, "innocent" publishers were obligated to yield their holdings in the interest of enhanced opportunity and diversification. *See id.* at 783-84 (observing that FCC studies, showing dominant role of television stations and daily newspapers as sources of local news, justified new regulations eliminating such combinations).

252. Justice Brennan, prior to his retirement, mustered a bare majority that upheld a federal preferential scheme for minorities in broadcasting. *See Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3027-28 (1990). Preferences to minorities survived constitutional challenge in proceedings for new broadcast licenses and for forced sales of existing licenses. *Id.* at 3004-05. The policies were upheld on the grounds that they promoted an important government aim of facilitating first amendment diversity interests. *See id.* at 3010-16 (noting that minority ownership in broadcasting promotes program diversity). Critical to the outcome was congressional approval, which prompted the Court to review the policy in relatively deferential terms. *See id.* at 3008 (explaining that Court is bound to approach task with appropriate

that is increasingly exacting on the majority's behalf and against traditionally excluded or disadvantaged individuals.²⁵³

Debate over race-conscious remediation has included assertions that the victims of affirmative action are "politically impotent" outcasts who deserve close jurisprudential attention.²⁵⁴ Reading equal protection as a principle to protect a clamoring majority rather than a historically disadvantaged minority would compound denial and evasion with myth. It also would create a legacy even more pernicious than that which Justice Harlan warned of when the Court fashioned the separate but equal doctrine.²⁵⁵ Such constitutional development mocks not only equal protection but also professions of judicial restraint insofar as it displaces remedial sentiment where it exists and the output of a representative political process.

Construction of race-oriented equal protection principles generally has evinced disengagement from, rather than attention to, the realities of discrimination and prejudice.²⁵⁶ Such circumstances necessitated the guarantee of equal protection's incorporation into the nation's charter and still demand actuation. Current equal protection jurisprudence, essentially representing a sense of what the dominant culture can tolerate, demeans both the Court, which must determine "what the law is,"²⁵⁷ and the Constitution. Such a guarantee, largely protective of the established order, has little or no constitutional significance apart from any imagery it may project.

Closer constitutional attention to discrimination and accommodation of initiatives calibrated to overcome racism may be unsettling,

deference when examining racial classification programs adopted pursuant to Congress' power under Commerce Clause, Spending Clause, and Civil War Amendments).

253. Traditional disadvantage, characterized by exclusion from or under-representation in the political process, originally justified close judicial scrutiny. See *supra* note 217 (discussing seminal implications of heightened scrutiny for minorities).

254. See *Johnson v. Transportation Agency*, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting) (arguing that affirmative action program is likely to affect least skilled jobs and thus discriminate against unknown, unaffluent, and unorganized non-favored groups who are least likely to have benefitted from past societal discrimination). But see Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1788-90 (1989) (arguing that affirmative action does not take away from "innocent" whites anything that they have rightfully earned but only denies increased prospects of success gained as consequence of racially discriminatory acts).

255. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (predicting that majority judgment allowing states to regulate citizens on basis of race will be treated poorly by history).

256. See Harris, *The Constitution, Education, and Segregation*, 29 TEMP. L.Q. 409, 413 (1956) (stating that separate but equal doctrine's deference to established usages, customs, and traditions disregards fourteenth amendment's purpose of precluding such traditions). See generally Deutscher & Chien, *The Psychological Effects of Enforced Segregation: A Survey of Science Opinion*, 26 J. PSYCHOLOGY 259 (1948) (noting policy of separating races usually interpreted as denoting inferiority of African-American race).

257. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (expounding duty of judiciary to interpret law).

unpopular, and even resisted.²⁵⁸ Recognition of such possibilities may deter the Court from formulating a more forceful and responsive system of equal protection accounting. The risk is probably exaggerated, however, insofar as meaningful review was visibly grounded within the purview of the framers' manifest concerns and rooted in the nation's traditions and conscience.²⁵⁹

A rare instance in which the Court confronted racial realities and declared official segregation unconstitutional proved a model not for confounding but for facilitating the democratic process.²⁶⁰ Progress toward equal protection objectives, although impeded by resistance to and frustration of the desegregation mandate,²⁶¹ eventually was effectuated by legislative intervention.²⁶² The consequent development of law, originally catalyzed by the Court's confrontation of racial reality and spurred by congressional initiative, presents an effective rebuttal to constitutional disengagement. Whether

258. See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring) (contesting premise that state and local governments may, in some circumstances, discriminate on basis of race to remedy effects of prior discrimination); Bell, *supra* note 229, at 528-29 (examining mounting opposition to desegregation mandate during 1950s); Note, *Affirmative Action Versus Seniority Rights*, 55 UMKC L. REV. 698, 708 (1987) (arguing that remedial affirmative action punishes innocent individuals instead of those actually responsible for racial disadvantage); *supra* notes 59-60, 102-11 and accompanying text (discussing resistance to desegregation mandate). But see Wonnell, *supra* note 156, at 120 (arguing that affirmative action is more problem than solution).

259. See *supra* notes 231-33 (discussing framer's original intent to ensure equal opportunity before law); *supra* notes 243-46 (suggesting that fourteenth amendment fundamental rights analysis presents standard providing more forthright accounting for minority claims and interests).

260. *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (finding separate education inherently unequal); see Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 LA. L. REV. 789, 790 (1988) (noting that as Supreme Court persevered against massive resistance to desegregation mandate, national priorities and policy followed suit as legislature assumed responsibility for effectuation).

261. See, e.g., *Keyes v. School Dist. No. 1*, 413 U.S. 189, 214 (1973) (finding intentionally segregative actions on part of school board); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 13 (1971) (discerning official resistance to desegregation mandate); *Green v. County School Bd.*, 391 U.S. 430, 438 (1968) (determining that school board deliberately perpetuated dual school system following desegregation mandate).

262. Elimination of dual school systems, insofar as it has been accomplished, is attributable in large part to federal laws that authorized the Justice Department to file desegregation suits and conditioned federal assistance on non-discrimination. See Civil Rights Act of 1964, 42 U.S.C. § 2000 a-d (1988) (prohibiting discrimination or segregation of public education and accommodations). 42 U.S.C. § 2000d is now read as a congressional mandate for change in pace and method of desegregation. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 852 (5th Cir.), *adopted as modified*, 380 F.2d 385 (5th Cir. 1966) (en banc), *cert. denied*, 389 U.S. 840 (1967). The Court in *Green* ruled that the sufficiency of a school desegregation plan must be measured by the degree of its effectiveness. *Green*, 391 U.S. at 442. The Court disapproved of a "freedom of choice plan," under which students chose the school they would attend, where the school remained substantially segregated and other educationally sound plans promised "a system without a 'white' school and a 'Negro' school, but just schools." *Id.*

Thus, the school desegregation context provides support for the contention that, when the Court confronts issues of discrimination and leads on policy, the country eventually follows and effective remedial legislation results. See Landsberg, *supra* note 260, at 790.

pitched toward discernible aims of the framers, or toward facilitating equal opportunity, judicial review that confronts the nation's legacy of racism remains a prerequisite for enhancement of equal protection in terms of its productivity and its responsibility.

CONCLUSION

Judicial review that denies and evades racism's legacy essentially disables the equal protection guarantee from accounting for its central concern. When validating the institution of slavery, the Supreme Court acquired a reputation as "the citadel of slaveocracy."²⁶³ Investment in the separate but equal doctrine later proved to be a decision "quite as pernicious."²⁶⁴ Unlike its predecessor in 1857, the modern Court lacks the excuse of not having equal protection as a constitutional reference point. Nor is the Court intellectually captive to the ideology of racial supremacy openly subscribed to in 1896.²⁶⁵ Criteria that help maintain the realities and consequences of racial injustice further compound past deficiencies. It thus may be that history ultimately will regard contemporary review, encompassing motive-based inquiry and color blindness, as an even less excusable and more opprobrious entry into the annals of racial jurisprudence.

Two centuries after the Constitution was structured in a fashion that documentally diminished the humanity of an entire class of persons, the subordination of racial justice to other priorities endures. As discrimination is considered a past rather than present phenomenon, and a legacy of disadvantage is allowed to compound, genuine reckoning becomes taxing and disruptive to the point its cost is prohibitive and no accounting ever is performed. As in the past, accommodation of interests at odds with the fourteenth amendment necessitates a denial and evasion of reality.

Nearly a century ago, Justice Harlan characterized as "pernicious" the analytical artifices that allowed slavery and segregation.²⁶⁶ It is difficult to envision how modern jurisprudence, insofar as it too avoids accounting for racial discrimination and disadvantage, will avoid a similar charge. The emergence and operation of motive-based inquiry and color-blind criteria actually may be perceived as doubly pernicious because they were introduced after acknowledge-

263. A. T. MASON, *supra* note 102, at 16 (noting that Court's validation of slavery profoundly diminished institutional reputation and prestige).

264. *Plessy v. Ferguson*, 163 U.S. 537, 559 (Harlan, J., dissenting).

265. *See id.* (acknowledging that white race is dominant in prestige, achievements, education, wealth, and power).

266. *Id.*

ment of systemic racial injustice and because they freeze relative accumulations of advantage and disadvantage. Now as ever, a full reckoning with racial injustice awaits investment in criteria that admit to rather than avoid reality.